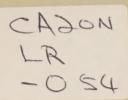
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ONTARIO LABOUR RELATIONS BOARD REPORTS



July 1995



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A Monthly Series of Decisions from the Ontario Labour Relations Board

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EDITOR: RON LEBI

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



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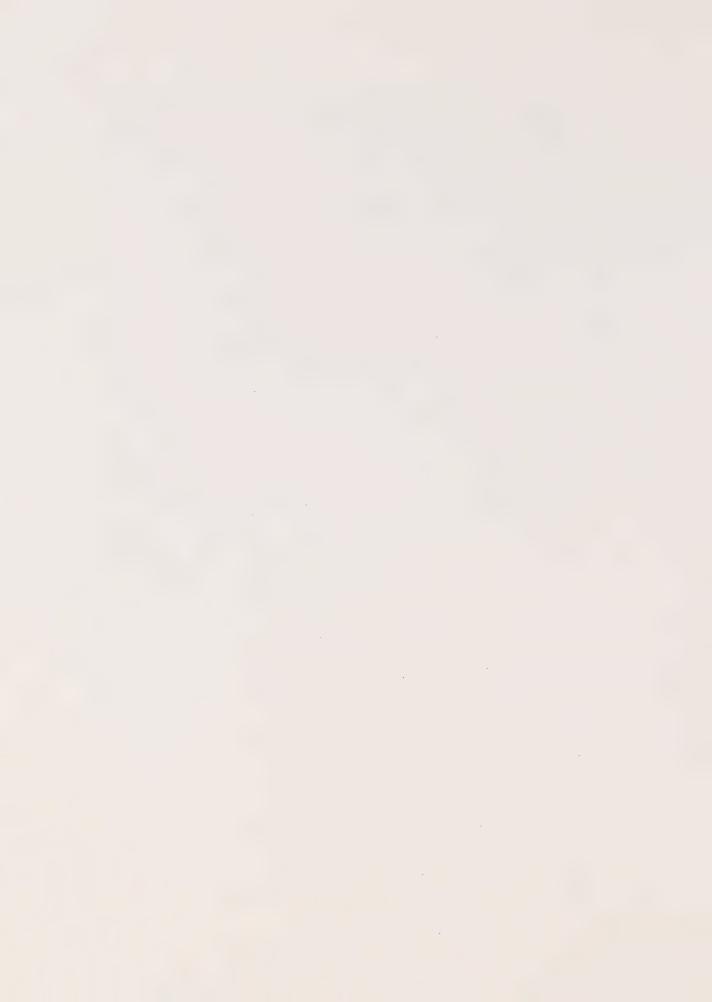
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1045

Union Successor Status - Board satisfied that signing merger agreement following ratification by members and that process of transferring "projectionist" members from various locals of IATSE to Local 173, effecting transfer of "projectionist" jurisdiction in sense contemplated by IATSE constitution and within meaning of section 63 of the Act - Board declaring Local 173 to have acquired rights, privileges and duties of predecessor IATSE locals in respect of "projectionists"

FAMOUS PLAYERS INC. AND CINEPLEX ODEON CORPORATION ET AL, IATSE, LOCALS 105, 257, 357, 461, 467, 580, 582 & 634 AND; RE IATSE, LOCAL 173.

954



0837-95-R 0838-95-R; 0839-95-U Ontario Public School Teachers' Federation Applicant v. **The Board of Education for the City of Toronto**, Responding Party

Bargaining Unit - Certification - Combination of Bargaining Units - OPSTF seeking to represent bargaining unit composed of certain program supervisors and lead instructors employed by school board - OPSTF already representing bargaining unit composed of other lead instructors - OPSTF seeking to combine new bargaining unit with previously certified bargaining unit -Board directing that bargaining units be combined

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members J. A. Ronson and K. Brennan.

APPEARANCES: Kathleen Martin and Harold Vigoda for the applicant, Richard Drmaj and Jill Vernon for the responding party.

DECISION OF K. G. O'NEIL VICE-CHAIR, AND BOARD MEMBER K. BRENNAN; July 26, 1995

- 1. The style of cause is hereby amended to reflect the correct name of the responding party: "The Board of Education for the City of Toronto". The applicant union will be referred to as OPSTF in this decision and the responding party as the Toronto Board.
- 2. The applicant requested that Board File No. 0839-95-U be adjourned *sine die* and the responding party did not object. Leave is hereby granted for that matter to be adjourned *sine die*. Unless either party requests that the matter be brought back on within one year of this decision it will be terminated. The remaining two files are related applications for certification and for combination of bargaining units.
- 3. OPSTF has applied for certification for a bargaining unit composed of two classifications. These are: i) program supervisors who work under the auspices of the continuing education department providing a service known as Language Instruction for Newcomers to Canada (LINC), ii) lead instructors who provide seniors' programs in the same department. Since 1992 OPSTF has been the bargaining agent for the lead instructors in the adult basic education, English as a second language and parenting programs run by the Toronto Board. It is common ground that OPSTF is certifiable in the new unit and there is no dispute about the scope of that unit, but rather about whether it should be combined and how it should be described. The union wishes the new unit and the previously certified unit to be combined under the provisions of section 7 of the *Labour Relations Act*.
- 4. The applicant's proposed unit is as follows:

all Continuing Education Language Instruction for Newcomers to Canada (LINC) Program Supervisors and all Continuing Education Seniors' Program Lead Instructors of the Board of Education for the City of Toronto in the City of Toronto.

The responding party's is as follows:

all Language Instruction for Newcomers to Canada (LINC) Program Supervisors and all Continuing Education Seniors' Program Lead Instructors of the Board of Education for the City of Toronto in the City of Toronto, save and except managers, administrators and persons above the rank of manager/administrator.

5. The existing bargaining unit is described as follows in the Board certificate:

all Continuing Education Adult English as a Second Language Lead Instructors, Continuing Education Adult Basic Education Lead Instructors, and Continuing Education Parenting Program Lead Instructors, of The Board of Education for the City of Toronto in the City of Toronto, save and except Lead Team Leaders (3) and employees in bargaining units for whom any trade union held bargaining rights as of the date of application, February 17, 1992.

- 6. The issues that the parties wished a hearing on were the following (in the order in which we deal with them below):
 - I. Whether or not the combination application should be granted.
 - II. Whether or not an interim certificate should be granted.
 - III. The wording of the bargaining unit, i.e. whether it should refer to the continuing education department specifically and whether or not the managerial exclusion line should be explicitly spelled out.
- 7. The parties stipulated agreed facts which made it unnecessary to hear *viva voce* evidence in this matter. We have summarized the most salient of these below. The Board heard argument on those agreed facts in relation to the issues above.
- 8. At the end of the hearing in this matter a majority of the Board, Board Member Ronson reserving his decision, found that the two bargaining units ought to be combined, but reserved on what directions should flow from that result. This decision provides our reasons for the decision combining the bargaining units as well as the issues related to the wording of the bargaining unit and further remedial directions.

- 9. The Toronto Board provides a number of programs under the auspices of its continuing education department. The application for certification involves two of those programs, the LINC program and the Seniors Program. The application for combination of bargaining units adds three other programs to those with which we are concerned: Adult English as a Second Language, Adult Basic Education and the Parenting Centre Program. Instructors teaching in these programs are represented by two different locals of the Canadian Union of Public Employees (CUPE). The employees for whom OPSTF seeks bargaining rights, and those for whom it was certified in 1992, are the people who supervise the instructors represented by CUPE. In the LINC program the instructors are known as program supervisors and in the other four programs the supervisors are known as lead instructors.
- 10. The LINC program is different from the other four programs in that its funding comes through federal government channels rather than provincial channels. The teaching services of the Board are purchased either directly by the federal government or by various community based organizations funded through the federal government. The LINC program is almost identical to the English as a second language program, with the exception of the fact that the LINC program is targeted to landed immigrants and convention refugees specifically, whereas the ESL programs are targeted to a broader constituency.
- 11. The employees in both the existing and proposed units are agreed to perform substantially similar duties and responsibilities, allowing for the differences between the various programs. These duties and responsibilities include administrative and program support to instructors, including observation, evaluation, workshops and other types of aid and assistance. In both the existing

and the proposed bargaining unit employees work on either an on-site basis or on an itinerant basis, travelling from school to school.

- 12. The members of both existing and proposed bargaining units have similar terms and conditions of employment. This includes an hourly rate of pay and no benefits, as well as seasonal lay-offs. They also have similar qualifications and experience. Both groups report ultimately to the superintendent of continuing education. However, the reporting line of the program supervisors in the LINC program is slightly different. The human resources for all of these individuals is handled by the same centralized department at the Toronto Board.
- 13. Each of the five programs is headed by an administrator. The person who administers the LINC programs title is LINC Manager. Her responsibilities are generally similar to the administrators of the other programs. In addition, she attends administrative meetings held by the Board along with the other administrators.
- 14. Several of the program supervisors in the LINC program had previously been employed as lead instructors in the existing bargaining unit. They applied for posted positions in the LINC program and were granted them. There is one lead instructor in the adult basic education program who has also supervised some LINC classes for at least the last two years. She therefore reports both to the administrator in the adult basic education program and coordinates her activities with the LINC classes with the program manager of the LINC program. There is some intermingling of the employees in both bargaining units and they share certain facilities.
- 15. Seven members of the existing bargaining unit are currently subject to notice of permanent lay-off.

The issues and their resolution

I. The combination of the bargaining units

Section 7, new to the Act in 1993, provides as follows:

- 7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.
- (2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:
 - Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
 - Combine the bargaining unit to which the certification application relates
 with other proposed bargaining units if the certification application is made
 by the trade union applying for certification for the other proposed bargaining units.
 - 3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

- (3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,
 - (a) would facilitate viable and stable collective bargaining;
 - (b) would reduce fragmentation of bargaining units; or
 - (c) would cause serious labour relations problems.
- (4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,
 - (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
 - (b) the employer's ability to continue to operate those places as viable and independent businesses.
- (5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.
- (6) This section does not apply with respect to bargaining units in the construction industry.
- 16. The major difference between the parties is as to whether or not the two bargaining units should be combined. Taking their cue from *Hydro Electric Commission of the City of Ottawa*, [1994] OLRB Rep. April 516, the parties agreed that the employer would argue on the combination application first.
- 17. Employer counsel argued that combining the proposed units would lead to serious labour relations problems and not contribute to viability and stability. It was his view that the only criterion of section 7(3) that was met by the facts of this case was the reduction of fragmentation. A series of factors together, dealt with below, create a serious labour relations problem in his view.
- 18. Employer counsel submitted that the Act encourages parties to bargain a collective agreement as quickly as possible and to maintain its terms throughout. Where something that does not facilitate that is introduced, serious labour relations problems are created. He referred to *Premark Canada Inc.*, [1993] OLRB Rep. June 540 at paragraph 30 where there is a discussion of the fact that the collective agreement of an existing bargaining unit does not necessarily have to apply to the new group in a combined bargaining unit. This leaves an option of renegotiating the collective agreement, which in counsel's submission is a recipe for instability. Here, argues counsel, the new unit would necessarily introduce a further complicating factor into a bargaining relationship which has already demonstrated its inability to successfully negotiate a collective agreement. Counsel was here referring to the fact that the existing unit was certified in 1992 and the first collective agreement has yet to be achieved. The parties are currently proceeding to first collective agreement arbitration and have appointed their nominees, but a Chair has not been selected.
- 19. Employer counsel also refers to the separate funding stream for LINC as a labour relations problem and a contributing factor to the instability of the bargaining unit itself. As well, he notes that seven people in the existing bargaining unit have been advised of termination. Counsel observes that there will be 10 new people inserted into the mix and the parties will have to deal with whether they are included in the seven to be laid-off or not. Counsel argues that if the bargaining unit combination were refused, it would not be necessary to face this problem.

- 20. The relevance of the difference in funding in counsel's view is that the administrative chain of reporting is different. There are differences in the rates of pay and in the funding formula which will lead to difficulties in collective bargaining and generally in labour relations if they are lumped in with a group with different funding. Counsel submits that unless the insertion of the new group would stabilize the relationship, the Board should find that combination would cause serious labour relations problems and refuse the order requested.
- 21. In addition to the above noted factors that tend to favour instability in the employer's view are community of interest problems. Referring to *Mississauga Hydro Electric*, [1993] OLRB Rep. June 523, counsel submits that this is an appropriate factor to be considered. In sum, counsel argues that the above factors together create a sufficiently serious labour relations difficulty to refuse the application for combination.
- The union argues that the Board's jurisprudence indicates that there is a low threshold for the applicant to succeed in a combination application and that every application that the Board has considered has been granted except where there were two different locals involved in the application. Counsel refers to *Mississauga Hydro*, cited above, *North Bay Nugget*, [1994] OLRB Rep. Aug. 1137 and *The Spectator*, Board File No. 1378-94-R, as yet unreported decision dated April 4, 1995 [now reported at [1995] OLRB Rep. April 559], to show the varied fact situations the Board has accepted for combination.
- Union counsel submits that this bargaining unit is much more coherent that many of the ones that have been granted in that there is one location with all five classifications doing substantially similar work, reporting ultimately to the same person, with their labour relations administered by the same department. Further, it is submitted that although community of interest is not a strong factor in many cases of combination applications, on the facts of this case, it would be strongly supportive.
- 24. The union disagrees that the combination would cause serious labour relations problems. Counsel argues that any difficulties in this fact situation can be dealt with by the fact that the unit is going to arbitration and these issues can be dealt with in that forum. But more basically, she argues that it is no different than any other case where the Board has looked at two groups at different stages. Union counsel argues that the funding difference should not be a factor in deciding whether or not a bargaining unit combination should be granted.
- 25. The union asked as remedy that the units be combined and the 1992 certificate be amended to incorporate the new unit. Further, she asked that the first contract arbitration be expanded and that the provisions of section 41 be held to apply to the new unit and that the Board remain seized.
- When asked why the Board should amend the certificate rather than giving its more usual order combining the units and remitting the matter to the parties to negotiate, counsel responded that this was the only case she knew of where there was a long existing certification with no collective agreement in place at the time of the application for combination. She said that Olympia and York Developments Limited, [1994] OLRB Rep. May 583 is the only case which has dealt with remedy under section 7(5) and she thought the facts of this case were very different. In her view, amendment of the certificate was necessary to make it part of the first agreement process.

27. In considering the arguments of the parties we are mindful of the context of the educa-

tion sector. Due to both statutory and other historical reasons, school boards have become a group characterized by an unusually high level of fragmentation of bargaining units. And the question of instructors of non-credit courses for this employer has been considered by this Board before. See *Toronto Board of Education*, [1986] OLRB Rep. June 900 where the Board refused to find a unit composed of some of the instructors in its "non-credit" continuing education department to be appropriate for collective bargaining. Although the detail before the panel in that case was not before the Board in this case, it is highly relevant background to the request made before us - to combine two very small classification based bargaining units. It is worth noting para. 24 of that decision, which reads in part:

24. Finally, for the purpose of completeness, we should reiterate the Board's traditional and continued reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmented bargaining which that creates (see, for example: Cryovac Division, W.R. Grace & Co. of Canada Limited, [1981] OLRB Rep. Nov. 1574; Toronto East General and Orthopaedic Hospital Inc., [1981] OLRB Rep. Nov. 1672; University of Ottawa, [1981] OLRB Rep. Feb. 232; and Wasteel-Rosco Company Limited, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry, where departmental unionization has existed in the extreme, the Board indicated in 1981 that it might reverse the entrenched organizing patterns of the past, in favour of broader-based bargaining (see Hamilton Spectator [1981] OLRB Rep. Aug. 1177). Most recently, in T. Eaton Company Limited, [1984] OLRB Rep. May 755 and Simpson's Limited, [1984] OLRB Rep. Sept. 1255, the Board repeated once again that it would not be conducive to orderly and stable collective bargaining to divide up an employer's business into bargaining units based on departments. ...

Here, the result of *not* combining the two units would leave two bargaining units of sub-departments of the continuing education department. Without compelling reasons for that result, the Board is not of the view that it is an approach consonant with the Board's jurisprudence on appropriate bargaining units or the provisions of section 7 of the Act which are explicitly aimed at reducing fragmentation.

- 28. The employer concedes that the order sought would reduce fragmentation somewhat, but argues that the other problems it would create outweigh that fact. We turn to the remaining criteria the facilitation of viable and stable collective bargaining and the causation of serious labour relations problems in light of the matters raised by the employer.
- 29. The employer argued and we agree, that the two categories are interrelated in that factors which cause problems with stability and viability are surely factors to be considered in deciding whether the order sought would cause serious labour relations problems. The employer argues that the insertion of a new group into the currently stalled round of negotiations would create instability, rather than stability. This is because it would create new problems of integration with the existing bargaining unit. In counsel's view it negates the whole idea of collective bargaining, as it leaves open the option of re-negotiating the collective agreement or here presumably whatever ground has been covered in negotiations to date, as there is not yet a collective agreement between the parties for the existing bargaining unit.
- 30. We are of the view that it is true that the integration of the new unit may well create some additional challenges at an already difficult set of negotiations. However, we are not of the view that this amounts to a labour relations problem serious enough to mean a combination order should not be granted. Firstly, there is no reason to believe it is anything but a start-up problem, i.e. there was nothing before the Board to suggest that any additional problems would be of a continuing nature. There was nothing to suggest that, for instance, the interests of the groups were in any way inherently discordant, such that merging the two units would create a situation that was not viable in the long-run.

- 31. We have considered whether separate funding is a factor that is so inherently destabilizing as to be an obstacle to a combination order. It is not our view that it is. It may mean that especially in an era of continuing restrictions on public funding that the separate funding creates an additional issue as to job security, but we do not see this as an issue going to the inherent viability of a merged bargaining unit. Indeed, there is also the possibility that a somewhat bigger unit may provide a measure of stability because the funding will not all be from one source. In any event, the most that can be said of the problem created by the separate source of funding is that it creates an issue to be dealt with at the table. If the units are not merged, the impact of a federal stream of money in a largely provincially funded operation will still have to be dealt with, but with all the additional costs of time and energy involved in a different set of negotiations leading to a separate collective agreement to be administered. There is nothing before us to suggest that once a collective agreement is in place the economies of scale (modest though they are in this fact situation) would not be available to the parties. In our view, the alternative of two very small units is significantly more of a problem to viability and stability than the problem of a separate funding stream.
- We have also considered the problem of the employees who are subject to lay-off in the existing unit and the problem created by the appearance of a new group on the scene. Merging of bargaining units can create difficult problems around issues of seniority and order of lay-off and recall, and the Board does not wish to minimize them. However, they are inherent to the existence of the power to combine units. It would be, in our view, a frustration of the will of the Legislature in passing section 7 to say that the existence of any problem with respect to the merger of seniority lists should stand in the way of a combination order. And there is nothing before us to suggest that this problem is a particularly intractable or unusual one. In sum, we do not find it a sufficiently serious labour relations problem to warrant the refusal of an otherwise sound combination order.
- 33. Thus, on balance, we were of the view that granting the order would further the objectives of the Act more so than refusing it.

II. Whether it is appropriate to issue an interim certificate

- 34. The employer opposed the issuance of an interim certificate because of the uncertainty of the language of the bargaining unit and of the combination application. The union wished an interim certificate if the application for the combination of bargaining units was not to be dealt with forthwith.
- 35. We are of the view that our oral decision that the bargaining units ought to be combined renders this issue essentially moot and it is not necessary to make any further comment about it.

III. Wording of the bargaining unit description

- 36. Should the departmental name appear in the description? The applicant wants to have the words "continuing education" appear in the bargaining unit description for the LINC program supervisors as well as for the adult ESL lead instructors. Counsel argued that this is consistent with what the parties agreed to previously in the existing bargaining unit and what is not in dispute for the senior's instructors. Union counsel referred to this as an editorial difference of opinion.
- 37. The employer wished there not to be a reference to continuing education in reference to the LINC program supervisors because of the separate funding stream and the fact that the parties have dealt with them separately, calling them program supervisors rather than instructors. Employer counsel pointed out that since this is a new program created by federal funding, it is essentially controlled by the federal government, rather than the usual control of a school board established under provincial legislation. It is placed for ease of administration as a sub-department

of the continuing education department, but the employer wishes it to be recognized as a separate funding area in the wording of the bargaining unit description, since it is federal money that is responsible for the hiring of the LINC employees. Counsel said that there was no magic as to why it should be included or excluded other than that the parties have agreed that there is a specific demarcation which separates LINC from the normal channels of continuing education.

- 38. Employer counsel also referred to examples of similar bargaining units in other school boards where "continuing education" was not put in the bargaining unit description.
- Should there be a managerial exclusion line set out in the description of the bargaining unit? The union asks that there be no specific managerial exclusion line because the bargaining unit is described by classification and because there are no managers who are program supervisors or lead instructors. As well, it is argued that this is consistent with what the parties agreed to in 1992 for the existing bargaining unit. Counsel refers to the *Sault Ste. Marie Board of Education*, [1987] OLRB Rep. Nov. 1425 where the only exclusions from an occasional teacher bargaining unit relate to teachers employed as Bill 100 teachers, rather than a managerial exclusion line. Counsel asserts that it does not make sense grammatically to insert a managerial exclusion where there is only a specifically named classification. Counsel argues that the traditional managerial exclusion is because the word "employee" is somewhat ambiguous in that there are managerial employees and employees under the Act, so one needs to clarify. She refers also to editorial bargaining units where the exclusions are listed by classification and not by the general managerial line. She submits that the practice is different depending on which sector of industry one is dealing with.
- 40. On this issue, counsel for the employer says that the jurisprudence of the Board generally recognizes a line of managerial exclusion. Here there is an upper line of reporting of administrators and that is what they seek to be expressed in the bargaining unit.
- 41. Counsel for the Toronto Board points out that the bargaining unit that reports to these supervisors in CUPE contains an exclusion line of lead instructors, program supervisors and those above the rank of those classifications. Counsel also referred to continuing education bargaining units in other school boards which had managerial exclusion lines, albeit many on agreement of the parties, rather than by decision of the Board on a contested matter.
- 42. The differences between the parties, on the material before us, appear to be editorial differences of opinion, describing a bargaining unit about which there is absolutely no lack of clarity between the parties. Neither party's proposal is "inappropriate" nor is there a compelling reason to pick one over the other. We have drafted language which reflects a mid-ground between these positions. The description of the combined bargaining unit will be as follows, to which the applicant's bargaining rights will now pertain:

all Language instruction for Newcomers to Canada (LINC) Program supervisors and all Lead Instructors in the Seniors' Adult English as a Second Language, Adult Basic Education and Parenting Programs of the Continuing Education Department of the Board of Education for the City of Toronto in the City of Toronto, save and except Lead Team Leaders (3) and employees in bargaining units for whom any trade union held bargaining rights as of February 17, 1992, managers, administrators and persons above the rank of manager/administrator.

43. We are not of the view that it is necessary to amend the certificate to effectuate the combination order, and are not inclined to do so. In reply on the question of remedy, employer counsel indicated that he was in agreement that if the combination were granted, that the first collective agreement arbitration should be expanded to include any outstanding issues. Having regard to the agreement of the parties, we direct that their submissions to the Board of Arbitration hear-

ing the issues in regard to the existing unit's first collective agreement include submissions on any issues outstanding in regards to the new unit as well as the existing unit. Essentially the parties have agreed to expand the scope of the first collective agreement arbitration. However, in the interests of encouraging negotiation and narrowing of the issues, we direct the parties to meet and negotiate on issues arising out of the above combination order before proceeding to arbitration.

44. We remain seized to deal with any remaining matter arising out of the above order.

DECISION OF BOARD MEMBER JAMES A RONSON; July 26, 1995

- 1. This is my first experience in dealing with the amendments in Bill 40 to the *Labour Relations Act* concerning the combination of bargaining units. Such are the vagaries of scheduling lately, at the Board.
- 2. I will be brief. The applicant union seeks to add new bodies to an existing bargaining unit that has failed to reach a collective agreement in two years of bargaining and which has instituted first agreement arbitration. There are serious problems raised also by the funding source for the salaries of the persons being added to the unit.
- 3. I do not need 14 pages to deal with these problems. It is obvious to me that granting the union request will throw the collective bargaining with the existing unit into disarray and will create serious labour relations problems. I do not understand Bill 40 to have that objective.
- 4. If the applicant union is entitled to a certificate it should read as follows:

"all Language instruction for Newcomers to Canada (LINC) Program Supervisors and all Continuing Education Seniors' Program had instructors of the Board of Education for the City of Toronto in the City of Toronto, save and except managers/administrators and persons above the rank of manager/administrator".

1108-95-U United Food and Commercial Workers International Union Local 175, Applicant v. **Budget Car Rentals Toronto Limited**, Responding Party

Ratification and Strike Vote - Strike - Strike Replacement Workers - Board satisfied that union provided employees with secret ballot process that employees could opt out of (rather than the reverse) and that notice of vote provided employees with ample opportunity to vote - Vote satisfying conditions in section 73.1(2) of the Act

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members S. C. Laing and D. A. Patterson.

APPEARANCES: Georgina Watts, Theresa Suppa-Magee and Jim Hastings for the applicant; M. E. Geiger, June Hagan, Les Dickens and Barry Prentice for the responding party.

DECISION OF THE BOARD; July 12, 1995

1. This is an application under section 73.1 of the *Labour Relations Act* in regards to a strike of the Budget Car Rental counter attendants and car jockeys at Pearson International Airport. At a point when the hearing of this matter had commenced, but not finished, the strike ended

as a new tentative collective agreement was ratified. Nonetheless, the parties have asked us to render a decision on the issue on which we had completed evidence and argument, i.e. whether or not the vote taken to authorize the strike met the conditions of section 73.1(2) and sections 74(4) to (6).

- 2. Section 73.1 provides that an employer is prohibited from using replacement workers under the conditions set out therein. A pre-condition is a strike vote as set out in section 73.1(2) which reads as follows:
 - 73.1(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:
 - 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
 - 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
 - 3. At least 60 percent of those voting authorized the strike.

Section 74(4),(5),(6), which are incorporated in the above sub-section, provide as follows:

- 74-(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.
- (5) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.
- (6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.
- 3. We have carefully considered all the evidence and argument made, although for the sake of brevity, we have only set out the most salient points here.
- 4. We heard a number of witnesses concerning the conduct of the vote and the following are our factual findings. Where there was a conflict in the evidence which needed resolving, we note our resolution of that conflict.
- 5. The bargaining unit in question consists of car jockeys and counter representatives. The car jockeys move cars around the airport for cleaning, fuelling and delivery to clients, while the counter representatives deal with members of the public concerning car rentals.
- 6. Negotiations between the parties resulted in a tentative agreement which was subject to ratification by the parties. A ratification vote was held by the union on June 7, 1995 and the tentative agreement was defeated by a large majority. Four days later on June 11, 1995, a strike vote was held in which authorization to go on strike was achieved with a similarly large majority, over 80 percent.
- Notices of the strike vote were posted at the various locations where Budget employees work some time on Friday, June 9, 1995. The exact time of posting is not clear from the evidence, but there is reliable evidence that they were posted at the latest by 5:30 p.m. The notices indicated the time and location of a strike vote meeting to be held at 9:30 a.m. on Sunday, June 11, 1995. After 5:30 p.m. the notices in the areas frequented most often by the counter representatives were amended to indicate that there would also be a meeting at 3:30 p.m. on the same day. As well, at

least one member of the bargaining committee also called some people to tell them of the strike vote.

- 8. There are 67 people in the bargaining unit. On the day set for the vote, over 80 percent, or 54 people, voted. This was facilitated by the fact that the employer allowed people on the day shift on Sunday to have time off to go and vote if they wished to. No employee has complained about lack of notice or the manner in which the vote was conducted.
- 9. The large majority of the people who voted did so at the 9:30 a.m. meeting. There were 51 people in attendance in a hotel meeting room that was approximately 25x24 feet. Chairs were set up in theatre style with an aisle down the middle. The room was somewhat crowded and some people were standing. At the front of the room was a small table where the two business agents, Theresa Suppa-Magee and Brian Noonan, were seated throughout the first meeting. In the corner behind them was a chair with a ballot box on it about seven feet from the first row of chairs. The ballot box was of a sufficiently rigid construction that people could put the ballot on the top of the box and mark it. Pens were provided.
- The evidence before the panel establishes that each person who appeared to vote was a member of the bargaining unit. They each signed in and were provided with a ballot one at a time at the table by the business agents. On a balance of probabilities, the Board finds that people voted by going up to the box with their back to the audience marking their ballot and putting it in the box. Although the business agents sometimes glanced in the direction of the voting in order to ascertain whether it was time to send another voter over, we are persuaded that they did not have the opportunity to actually see how people marked the ballots.
- 11. Similarly, we are persuaded that the audience was not in a position to see how people marked the ballots unless the voter had decided to show how he or she marked the ballot to the audience. There is no evidence that anyone did so, and both Jane Carter, a member of the bargaining committee, and Theresa Suppa-Magee testified no one did.
- 12. Employer counsel challenged the credibility of Jane Carter, the witness who gave evidence that the voters voted with their backs to the audience. He also suggested that the most logical thing for a voter to do in such a crowded circumstance would be to mark the ballot against the wall. Although there are some inconsistencies between the evidence of Ms. Carter and Ms. Suppa-Magee, notably about whether or not people were allowed to leave the room during the voting, we are not persuaded that we should reject Ms. Carter's evidence wholesale. On the point in question about whether or not people voted with their backs to the audience, her evidence is corroborated at least in a general way by Ms. Suppa-Magee's. Ms. Suppa-Magee's evidence was that the audience was instructed that it was a secret ballot and that were to go into the corner individually to vote. The manner of giving out the ballots clearly indicated that it was not a public ballot.
- 13. There was a second meeting at 3:30 p.m. which was structured in a similar manner except that it was only attended by about three people and Mr. Noonan was the only business representative present. After that meeting, the ballots were counted without incident.
- 14. The requirements of section 73.1(2) are designed to make sure that in order to get the benefit of the replacement worker provisions, a union must have obtained the support of a significant majority of voters. An ample opportunity to vote for all members of the bargaining unit, whether members of the union or not, must be given and the ballots must be cast in such a manner that a person's choice cannot be identified with any individual voter. In this case, there is no dispute that the vote was held after bargaining had begun or notice to bargain was given, or that 60 percent of those voting authorized the strike. Rather, the employer questions whether the manner

of notice allowed ample opportunity to vote and whether the vote was conducted so that the persons voting could not be identified with their choice.

- 15. On the issue of notice, employer counsel argued that the union is required to give notice in a way that every member of the bargaining unit knows about the vote and has an opportunity to be at the vote. It is submitted that employees who were off Friday, Saturday and Sunday (approximately six) could not have seen the notice and that there is no reliable evidence that the notices were posted prior to the end of the Friday day shift. The union argued that the notice was sufficient. We are asked to take into account the fact that employees were told at the ratification vote meeting on June 7 that there would be a separate strike vote, as well as the speed with which the workplace "grapevine" would carry news of a strike vote. In the union's view, the turnout at the strike vote speaks for itself that members of the bargaining unit were well aware of the vote.
- 16. We are of the view that all of the circumstances of this case warrant a finding that members of the bargaining unit had ample opportunity to vote and that notice was sufficient. We have no evidence that anyone did not get notice. The number of people who showed up to vote establishes that notice was received by a very large majority of the bargaining unit. We are not of the view that the possibility that some people did not get notice directly from the posted notice warrants an inference that there was not ample opportunity to vote or sufficient notice of the vote.
- 17. On the issue of secrecy of the ballot, employer counsel stressed the wording of section 14(4), "cannot be identified", indicating that there should be a strict test. He relied on *Toromont Industries Ltd.*, [1994] OLRB Rep. Aug. 1149 for the proposition that the onus is on the union to establish that the strike vote meets the Act's requirement. After setting out the history of sections 74(4) to (6) as reviewed in *RCA Limited*, [1981] OLRB Rep. Aug. 1159, the *Toromont* decision holds as follows:
 - 32. The Board in *RCA Limited*, correctly in our view, saw section 74(4) as a legislative attempt to alleviate the pressures on employees faced with making a choice in strike or ratification situations by requiring that employees be given an opportunity to vote secretly. That is, section 74(4) is a legislative requirement that strike and ratification vote be by secret ballot.
 - 33. Accordingly, the onus is on a trade union which holds a strike or ratification vote to structure that vote in such a way which provides employees with an opportunity to mark and cast their ballots in secret. It is not appropriate that a strike or ratification vote be structured in a way which puts the onus on employees to take steps to ensure the secrecy of their ballots. If an employee, having been given an opportunity to vote secretly chooses to make a display of him/herself or his/her ballot, that is up to that employee (and does not operate to invalidate a vote). But an employee must have that clear opportunity, free from the prying eyes of others, and without having to make obvious special efforts to do so him/herself. In other words, a trade union must structure a vote so that it is by secret ballot which employees can opt out of, rather than by some sort of open vote process which requires employees to individually opt in to a secret ballot.

The majority, Board Member Patterson dissenting on this point, agrees with the *Toromont* decision and its interpretation of the requirement of a secret ballot.

18. We are satisfied here that the union provided a secret ballot process that the employee could opt out of rather than the reverse. The facts before us are substantially different than those in *Toromont*, cited above, where there was evidence that an employee did see how another voted, and the set up of the voting was such that members of the bargaining committee and union representatives could scrutinize people making their ballots. As well, there was no instruction that the ballot was to be secret and people did not vote one at a time.

- 19. This is not to say that the union could not have done more to ensure secrecy of the ballot. A screen and a table much like those used in provincial elections would have left little room for doubt about whether the physical arrangements in this case provided secrecy. However, we are satisfied that the evidence is persuasive on the balance of probabilities that the ballots were cast in a manner that the vote of the employees could not be identified with the person who voted.
- 20. Various assertions were made by employer counsel about activities of certain members of the bargaining committee after the conclusion of the first tentative agreement coupled with the unusually high level of rejection of a tentative agreement which was to have been unanimously recommended for ratification. We are not of the view that it would be helpful at this point to set them out here. Suffice it to say that we were not of the view that the evidence was sufficient to impact on our finding that the vote met the requirements of the Act.
- 21. We have provided these reasons at the request of the parties for their future guidance. Since the strike is now over, it is unnecessary to consider this application any further, and the matter is hereby terminated.

3912-94-R; **3913-94-R**; **4154-94-U**; **4155-94-U** International Brotherhood of Electrical Workers, Local 586, Applicant v. **Dare Personnel Inc.**, Responding Party; International Brotherhood of Electrical Workers, Local 586, Applicant v. 1092009 Ontario Inc. c.o.b. as Personnel Force, Responding Party

Certification - Construction Industry - Employer - Board finding that responding personnel agencies not the employers of electricians for whom union seeking bargaining rights

BEFORE: Janice Johnston, Vice-Chair, and Board Members J. A. Ronson and R. Montague.

APPEARANCES: Peter Engelmann and Tom Reid for the applicant; Catherine Auchinleck for Dare Personnel Inc.; Daniel McGuire for 1092009 Ontario Inc., c.o.b. as Personnel Force.

DECISION OF JANICE JOHNSTON, VICE-CHAIR, AND BOARD MEMBER J. A. RONSON; July 4, 1995

- 1. File No. 3912-94-R and 3913-94-R are applications for certification made under the construction industry provisions of the *Labour Relations Act* (the "Act"). File Nos. 4154-94-U and 4155-94-U are applications pursuant to section 91 of the Act.
- The parties are in dispute concerning a number of issues. This decision shall deal with only one of those issues. At the outset of the hearing the parties agreed that it was appropriate for the Board to deal first with the contention of the responding parties, Dare Personnel Inc. ("Dare") and 1092009 Ontario Inc., c.o.b. as Personnel Force ("P.. Inc.), that they are not the employers of the individuals for whom the union seeks bargaining rights. The question before the Board therefore is "are the persons for whom the union seeks bargaining rights employees of Dare and P.. Inc.". For reasons which will become apparent, it is important to note at the outset that this is the question before the Board not the broader question, namely "who is the employer of the persons in question".

- 3. The Board heard evidence from seven witnesses over four days of hearing. All the witnesses gave their evidence in a candid straight-forward manner. While there are minor discrepancies in some of the evidence, these discrepancies are for the most part explained by the witnesses' perspective on a certain issue and differences between first and second hand knowledge. Where it is necessary these discrepancies will be pointed out and preference given to one witness's version of events over that of another. It is not necessary to set out in detail all of the evidence heard by the Board and we will not do so.
- 4. Before turning to the facts of this case it is helpful to set out the jurisprudential backdrop against which the facts will be measured. In the *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, the Board stated in paragraph 10:
 - 10. In determining which of two or more parties is or are the employer(s) of certain employees, the Board has applied a series of criteria which are listed below:
 - (1) The party exercising direction and control over the employees performing the work. See the Municipality of Metropolitan Toronto case, 61 CALL ¶16,214; the Sentry Department Stores Limited case, [1968] OLRB Rep. 540, 546; the Beer Perkiest Concrete Limited case, [1970] OLRB Rep. 224, 227-8; the Belcourt Construction (Ottawa) Limited case, [1971] OLRB Rep. 321, 324; and the Red's Holdings (Belleville) Limited case, [1972] OLRB Rep. 753, 761.
 - (2) The party bearing the burden of remuneration. See the Municipality of Metropolitan Toronto case, supra; the Beer Precast Concrete Limited case, supra; the Kel Truck Services Ltd. case, 1972 CLLC ¶16,068; and the Templet Services case, [1974] OLRB Rep. 606, 608.
 - (3) The party imposing the discipline. See the Reid's Holdings (Belleville) Limited case, supra.
 - (4) The party hiring the employees. See the Municipality of Metropolitan Toronto case, supra; the Sentry Department Stores Limited case, supra; and the Reid's Holdings (Belleville) Limited case, supra.
 - (5) The party with the authority to dismiss the employees. See the Municipality of Metropolitan Toronto case, supra; and the Templet Services case, supra.
 - (6) The party who is perceived to be the employer by the employees. See the Sentry Department Stores Limited case, supra.
 - (7) The existence of an intention to create the relationship of employer and employees. See the *Belcourt Construction (Ottawa) Limited* case, *supra*.
- 5. Since the York Condominium case the Board has made it clear that the criteria set out above were not to be assigned any particular order or priority and each was to be considered in turn relative to the particular facts of each case. However, the Board has attached a great deal of significance to the question of who exercises fundamental or overriding control over the employees in question. It was put this way in the Sutton Place Hotel, [1980] OLRB Rep. Oct. 1538:
 - 44. A particularly important question answerable through an evaluation of all of the factors set out in *York Condominium* is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases, day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in *York*

Condominium inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of *The Labour Relations Act*.

- 6. A good summary of the factors considered by the Board in determining who is the employer was provided in *Grant Development Corporation*, [1993] OLRB Rep. Jan. 21 at paragraph 26:
 - 26. In determining who is the "employer" of persons who are undeniably the employees of someone (i.e., as opposed to self-employed independent contractors), the Board typically considers a variety of factors, some of which are interrelated or overlap. These include: who exercises direction and control of the employees when doing their work, who allocates their duties, corrects performance, sets standards, determines hours of work, and so on; who sets wage rates and bears the burden of remuneration; who appears to be hiring the employees, imposing discipline (if any) and terminating employment for cause or otherwise; for whose benefit do the employees expend their labour and from what source do their work opportunities appear to arise; to put the matter another way, for whose organization do they appear to be working, and of which organization do they appear to be a part while performing their duties; whom do the employees themselves perceive to be their employer; was there an expressed intention to create an employment relationship, and if so, with whom; does one organization or another hold itself out to be the employer; and, apart altogether from common-law considerations, what choice appears to be more consistent with the statutory and labour relations framework within which the Board operates, and the decision must be made. None of these factors is necessarily determinative. Each case must be considered on its facts. However, the Board must be careful not to let commercial form obscure labour relations realities. (See generally cases such as York Condominium Corporation, [1977] OLRB Rep. Oct. 645; Ralston Purina Canada Inc., [1979] OLRB Rep. June 552; Sutton Place Hotel, [1980] OLRB Rep. Oct. 1538; Sylvania Lighting Services, [1985] OLRB Rep. June 1173; Thunderhawk Developments, [1983] OLRB Rep. Aug. 1378; Alwell Forming Limited, [1978] OLRB Rep. Aug. 709; and, more recently, Nichirin Inc., [1991] OLRB Rep. Jan. 78.)
- Dare and P.F. Inc. are personnel agencies whose primary work involves supplying office, clerical and administrative staff on a short term basis to a variety of clients including the Federal Government. In recent years their service has expanded to include the supply of trades people, including electricians, to the Federal Government. In this case we are dealing with the supply of electricians to the Department of Public Works and Government Services Canada ("Public Works"). The electricians are supplied pursuant to a contractual arrangement referred to as a "standing offer". The standing offer of any one agency also incorporates other documents which when read together outline the various contractual agreements and undertakings made by the personnel agency. It is clear in the standing offer and the other documents that the personnel agency is set out as the "employer" of the various temporary workers. Obviously, if the legal form of the arrangement between Dare and P.F. Inc. and the Federal Government was the determinative factor, our inquiry could end at this point. However, the Board in determining employee-employer status must look beyond the legal or commercial arrangements between the supplier and the recipient of temporary services (see in this regard Sylvania Lighting Services, [1985] OLRB Rep. July 1173 and Grant Development Corporation, supra). Thus the fact that the legal documents reflect that Dare and P.F. Inc. are the employers is not determinative of this issue.
- 8. In late 1994 and early 1995 Dare and P.F. Inc. advertised for qualified electricians. When an individual electrician responded by telephone he/she would be informed that the rate of pay was significantly less than the unionized rate of pay. If the electrician was still interested in work referrals then he/she would go to the office of P.F. Inc. or Dare. At that time the individual would fill out an application form, undergo a short interview and have copies taken of his/her electrician's license(s). References provided by the electrician were checked. If work became available

the electrician would be referred to a job site. The vast majority of work available for temporary electricians was with Public Works. For work in certain government buildings, security clearance was necessary. P.F. Inc. and Dare had blank copies of the requisite forms. They would request that the electrician fill out the forms and do whatever else was necessary prior to sending them to the branch in the Federal Government responsible for issuing the security clearance. If a certain job required a certain level of security clearance, a temporary electrician could not be referred to that work unless the appropriate clearance had been provided by the Industrial and Corporate Security Branch of Supply and Services Canada.

- The evidence clearly establishes that Dare and P.F. Inc. do not exercise any direction and control over the day-to-day work activities of electricians they refer to Public Works. Dare and P.F. Inc. give the temporary electricians an address to report to. Once an individual reports to this address a foreman employed by Public Works either tells him/her where the work site is or takes the individual there personally. Jim Golden, a foreman at Public Works takes a copy of the electrician's license(s) and S.I.N. number before sending or taking him/her to the job site. Once on the site, work direction is provided by a key person who is normally a full-time Public Works electrician. While working on a Public Works' site, the temporary electrician is fully integrated into the crew. He/she is bound by all Public Works policies such as, for example, smoking policies. The temporary electrician performs the same work, works the same hours and takes the same breaks as the Public Works' employees. Direction and control of the temporary electricians while they are doing their work and the allocation of daily duties is provided by Public Works. No on-site supervision is provided by Dare or P.F. Inc. Once the temporary electrician commences a job he/she has little or no contact with the personnel agency which made the work referral. Weeks or months can go by, depending on the length of the assignment, with no direct communication taking place between Dare and P.F. Inc. and the temporary electrician. Generally, Dare and P.F. Inc. have no idea what day-to-day work is being performed by the electrician or where it is being performed. If time off is required approval for the absence is sought from the Public Works' employee in charge of the job site. If the temporary electrician is ill, he/she notifies the appropriate Public Works employee. If overtime is to be worked it is offered to all of the crew members on the site. No approval from the personnel agency is sought or required prior to a temporary electrician working the overtime.
- 10. The Board heard a great deal of evidence regarding the uniforms supplied by Public Works to the Public Works' electricians and not to the temporary electricians. There was a significant discrepancy with regard to who wore their uniforms (or part of their uniforms) and how often they were worn. After having weighed this evidence we are of the view that some employees wear their uniforms some or most of the time. All of the evidence pointed to the fact that there was not a total acceptance of the uniforms. Therefore, on any given day, on any given site, one could not conclusively point to various individuals and say "they do not work for the Public Works Department". In addition, there was some dispute concerning who was invited to and who attended various departmental Christmas parties. It appears that some temporary workers are invited to and attended some of the parties. In any event, in our view, these aspects of the work arrangements are of limited assistance in our determination.
- 11. A temporary electrician is required to supply his own tool pouch and small hand tools, whereas a Public Works' electrician is issued departmental tools. The power tools and larger equipment is supplied to both types of workers by Public Works. In addition, beepers were supplied to temporary electricians as well as Public Works' electricians and all employees drove Public Works' vehicles. Training was provided by Public Works to the full-time electricians but not to the temporary electricians. The benefits enjoyed by the full-time Public Works' employees are much better than those enjoyed by the temporary electricians.

- Public Works has the authority to discipline and terminate the contract of a temporary electrician. Jim Golden has spoken to several temporary electricians on a variety of subjects. If a problem arises it is dealt with by the Public Works' foremen. If Public Works does not want a particular temporary electrician initially sent to them they can refuse the person or if they do not want a temporary electrician to continue performing work on their job site, for whatever reason, they can remove that worker and ask for a replacement worker. Therefore, various individuals in Public Works have the authority to make a decision which determines whether an individual electrician will work or not and thereby have the opportunity to earn or continue to earn money. The decision to remove a worker from the site is always made by the Public Works' Department.
- Dare and P.F. Inc., issue paycheques to the temporary electricians based on completed timesheets which are sent to them from Public Works. Dare and P.F. Inc. provide blank timesheets to either Public Works or the temporary electrician directly. The Board heard a lot of evidence concerning these timesheets which are utilized to determine the pay of a temporary electrician. We heard from different witnesses that either the worker, or the key man on the site, or the foreman fills out the timesheet. It is apparent that the practice varies and that various individuals fill out the hours on the timesheet. Regardless of who fills the timesheet out, unless it is signed by a Public Works' official (normally the foreman) the temporary electrician will not get paid. Similarly, a temporary electrician will not get paid for overtime hours unless payment for those hours is authorized by Public Works. Therefore, regardless of who fills out the timesheets, Public Works is responsible for determining and authorizing payment for hours worked by the temporary electricians. This information is forwarded to P.F. Inc. or Dare who then perform a payroll service for the Public Works' Department. When travel is required the Department of Public Works pays a travel and accommodation allowance directly to the temporary electrician.
- 14. In assessing who bears the burden of remuneration the Board must look at who is receiving the services for which payment is being made. It is this provision of services which triggers the obligation to pay, not the mere fact that an electrician has registered with either Dare or P. F Inc. as available for work. In our view it is not Dare and P.F. Inc. who bear the ultimate burden of remuneration in this case but the Department of Public Works. The fact that Dare and P.F. Inc. are acting as paymasters does not make them the employer of the temporary electricians (see in this regard *Theatre Corp. Limited*, [1992] OLRB Rep. Mar. 388 and the cases referred to therein; and *Sylvania Lighting Services*, [1985] OLRB Rep. July 1173).
- 15. Prior to issuing payment to a temporary electrician Dare and P.F. Inc. make all of the necessary source deductions such as income tax, CPP and UIC and remit the amounts withheld to the appropriate agency. Dare and P.F. Inc. are responsible for providing Workers' Compensation coverage to the temporary electricians and therefore pay the necessary Workers' Compensation Board assessments. Dare and P.F. Inc. will also issue records of employment on request and "T-4's" to the temporary electricians.
- 16. In the past, the hourly wage to be paid to the temporary electrician was dictated by Public Works. Dare was told to pay a temporary electrician at the same wage rate as that paid to the full-time Public Works' electricians. This then changed and under the current arrangements the temporary electricians are paid much less than the Public Works' electricians. The only stipulation at this point is that the temporary electricians are not to be paid more than the Public Works' electricians.
- 17. Much was made by the applicant of the fact that the agencies "hired" the temporary electricians. While the agencies no doubt screened them, ensuring they possessed the requisite licenses and experience prior to referring them to work at the Department of Public Works, this

screening and referral function is very similar to the role played by hiring halls in the construction industry. There can be no doubt that the normal functioning of a hiring hall does not create an employer/employee relationship. (See in this regard *Theatre Corp. Limited*, *supra*, at paragraph 63, and generally *Joe Portiss*, [1983] OLRB Rep. July 1160). In addition, the Department of Public Works does not play a completely passive role in the "hiring" of the temporary electricians. Prior to allowing the electrician to commence work, Mr. Jim Golden, the only Public Works' foreman the Board heard from, indicated that he photocopies the electricians' license(s) and Social Insurance Number. In addition, depending on the work site, a temporary electrician may be prevented from working if he/she does not have the necessary security clearance. Given the above, an analysis of the "hiring" process on the facts of this case does not establish that either the personnel agencies or their "clients" are solely responsible for hiring the temporary electricians.

- 18. Three electricians called by the applicant as witnesses, all of whom have worked as temporary electricians for Public Works, were unanimously of the view that their employer was either Dare or P.F. Inc. The reasons put forth for this opinion were: that the agency paid them; that they responded to an ad put out by the agency; that they filled out an application form for employment with the agency; and that they were interviewed by the agency.
- The final factor referred to in the York Condominium case is the intention to create an employer/employee relationship. In spite of the legal and commercial documentation to the contrary, Jocelyn Vitanza, the principle for Dare and Paul Gillissie, the principle for P.F. Inc. made it clear that they do not view the temporary electricians to be their employees. In signing their standing offer with the Federal Government, it was not their intention to create an employment relationship with the temporary electricians or any other worker supplied pursuant to that agreement. In determining whether P.F. Inc. and Dare are the employers of the temporary electricians the Board must assess all of the facts before it and look beyond the "paper transactions". In this case there is no reason to doubt that Dare and P.F. Inc. do not view the temporary electricians as their employees. However, this evidence is quite self-serving as is the case with the evidence given by the individual temporary electricians regarding who they viewed to be their employer. Accordingly, it is of little assistance to the Board in the determination we are called upon to make.
- 20. The Department of Public Works does not issue tools and uniforms to the temporary electricians. Although this could be interpreted as evidence of an intention to not treat the temporary electricians as employees, it could also be evidence of the fact that budgets have been shrinking and it is expensive to supply tools and uniforms to individuals whose employment may be somewhat transitory in nature.
- In assessing who exercises fundamental control over the temporary electricians, on the facts of this case, we must conclude that this control does not lie with Dare and P.F. Inc. It is the Department of Public Works who determines: if a temporary electrician will work, and thereby will have the opportunity to earn wages; where that work shall be; how long that work will last; how the work is to be performed; and under what conditions it shall be performed. While Dare and P.F. Inc. perform a screening and referral service and a payroll service they are not involved in any aspects of the work performed by the electricians which would indicate fundamental control over them once they are referred to the Department of Public Works. As was noted earlier, the issue of fundamental control is the key to the determination before us and the one upon which most reliance is placed. While the temporary electricians may have viewed the personnel agencies as their employer, this factor when balanced against the lack of intent to create an employment relationship on the part of Dare and P.F. Inc. becomes of less assistance to the Board in the determination before us.

- 22. There appear to be two cases in which the Board has dealt with the question of who is the employer in the context of a personnel agency where the Board concluded that the employer was the agency. (There are numerous cases in which the opposite conclusion was reached). One of these cases, *The Tower Company (1961) Limited*, [1979] OLRB Rep. 583, was referred to us by counsel for the applicant. The other decision is *Templet Services*, [1974] OLRB Rep. Sept. 606. *Templet* is distinguishable from the case before us as in that case the agency had the authority to discipline and had input in to the day to day supervision of the employees in question. The Board in *Templet* therefore concluded that the overriding control of the work performed resided with the agency. This is not the situation in the case before us.
- 23. While *The Tower Company* case bears more similarity to the case before us, nevertheless there are differences. In that case the Board relied heavily on the fact that the agency "hired" the workers. In the case before us this factor is neutral. The Board in *Tower* also appears to have given significantly more weight to the "form" of the relationship between the agency and its client and relied on the fact that the agency was named as the employer in the commercial contract. As already noted, in recent cases, the Board has not placed as much reliance on the form of the legal or commercial contract in place in assessing who is an employer and, in our view, this is the more appropriate approach to take.
- 24. Therefore, on the facts of this case and in light of the Board's jurisprudence it is our conclusion that Dare and P.F. Inc. are not the employers of the individuals for whom the union seeks bargaining rights.
- Counsel for the applicant referred the Board to two cases P.S.A.C.v. Canada (AG), [1991] 1 S.C.R. 614 (Econosult) and Canada (AG)v. Gaboriault, [1992] 92 CLLC ¶14,057 (Fed. C.A.) in support of an argument that the Board does not have the jurisdiction to find that the temporary electricians are employees of the Federal Government. In counsel's view, if the Board finds that the temporary electricians are not employees of Dare and P.F. Inc. we are by default saying they must be Federal Civil Servants.
- 26. We do not dispute counsel's assertion that it is not within the Board's jurisdiction to determine who is or is not an employee of the Federal Government. Even if this was not the case it would not be appropriate for us to focus on this issue as the Federal Government was not named as a responding party in this certification application and did not appear before us. It would not be appropriate for us to conclude that an entity, which is not a party to these proceedings, was the employer of the temporary electricians. In any event, as was noted at the outset of this decision, the question before us is whether Dare and P.F. Inc. are the employers of the temporary electricians. Having concluded that they are not, we can go no further.
- As a supplement to the above argument, counsel for the union took the position that the Board should keep the purposes of the Act, in particular section 2.1 in mind when deciding this case. Section 2.1(1) provides:

The following are the purposes of the Act:

1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.

Counsel argued that if the Board concludes that the personnel agencies are not the employer of the temporary electricians these individuals will be denied union representation. In counsel's view, unless the temporary electricians are public servants, they cannot be employees of the Federal Government. (See *Econosult*, *supra*). Or as it was put in *Gaboriault*, *supra*, "a person cannot be

an employee of the Federal Government without an express appointment or formal hiring duly authorized by law".

- While we would agree that the purposes of the Act are never to be ignored, on the facts of this case, it would be unreasonable to conclude that the agencies, given their limited role, are the employer of the individuals in question. We must make our decision on the facts before us with a view to the existing jurisprudence. We cannot find an employer/employee relationship between Dare and P.F. Inc. and the temporary electricians that does not exist.
- 29. For all of the above reasons the two applications for certification are dismissed.
- 30. The applicant is directed to contact the Registrar within ten days of the receipt of this decision to advise as to what steps it would like to see taken regarding the two unfair labour practice complaints. Given the evidence already heard by this panel of the Board, it is appropriate for us to remain seized of these matters.

DECISION OF BOARD MEMBER R. R. MONTAGUE; July 4, 1995

- I dissent. With respect, the "who is the employer" jurisprudence simply does not apply to the case before us. In all of those cases, the issue was one of determining which of two or more parties is or are the employer(s) of certain employees. Here, since the company alleged to be the employer was not made a party to these proceedings, this caselaw is inapplicable. In any event, while at first blush the Department of Public Works may appear superficially to be the employer, the Board must look beyond the form and appearance of the relationships involved to their realities. Based on all the circumstances, I am of the firm view that Dare Personnel Inc. and Personnel Force Inc. are the employers of the workers in question.
- 2. The "who is the employer" cases represent an interesting and perhaps inevitable phenomenon which has confronted the Board in applying the *Labour Relations Act*. Since the Act is limited to regulating relations between employers and trade unions, in order to be certified as a bargaining agent, it is incumbent upon a trade union to demonstrate that the employees whom it seeks to represent are in fact employees of the respondent employer. While in most cases this is a relatively straightforward question, in many others, the question is more complicated. For the most part, in these cases, the difficulty in identifying the employer arises from complex corporate organizations, subcontracting, and the use of temporary personnel companies.
- 3. In addition to the difficulties presented by complex corporate structures, the Board has found in a not inconsiderable number of cases that the "who is the employer" cases represent a sort of jockeying among companies, all of whom claim that they are not the actual employer of the employees in question but rather that some other entity is. These cases are perhaps inevitable given that the purposes of the Act are, *inter alia*, to encourage the process of collective bargaining so as to enhance the ability of employees to collectively negotiate terms and conditions of employment with their employer and to increase employee participation in the workplace and given the elementary fact which the Board can take judicial notice of that collective bargaining has generally had the effect of improving employees' working conditions and terms of employment. However, the fact that collective bargaining may assist employees in improving their terms of employment, of course, cannot influence the Board's application of the Act nor can it justify in law an employer's avoidance of its application (*K-Mart Canada Ltd.*, [1983] OLRB Rep. May 649 at 664, *Westinghouse Canada*, [1980] OLRB Rep. Apr. 577 at 607-608; *Nichirin Inc.*, [1991] OLRB Rep. Jan. 78 at 80). This, then, is the context within which the "who is the employer" jurisprudence has taken shape.

- 4. In the "who is the employer" caselaw, the Board has enumerated and applied certain factors which are to be used in determining which of two or more parties is or are the employer(s) of certain employees. Here, given that the other entity which the respondent alleges to be the employer is not a respondent to the action and has not been given notice thereof, the whole of the "who is the employer" jurisprudence referred to by my colleagues is inapplicable. In other words, if there is not in fact "two or more parties", the Board cannot determine which of two or more parties is or are the employer(s) of certain employees.
- 5. That said, however, certain cases have not taken this approach and it is therefore necessary to assess the case before us in light of the traditional factors. The personnel company cases have generally involved employers who have attempted to avoid being characterized as the employer by claiming that a temporary agency was the employer. In contrast, in the case at bar, it is the temporary agency (and not the company) which is trying to avoid being identified as the employer. There is no suggestion that the other entity, which is not a respondent to this action, has behaved in a way so as to avoid its obligations under the Act. This is not to say that anti-union animus is a necessary ingredient in finding that a respondent was the employer. In fact, it clearly is not. The point is merely to emphasize the context in which the question of "who is the employer" has arisen in past cases involving temporary personnel companies.
- 6. The applications for certification at issue in this case were brought together with complaints by the union under section 91, alleging violations of sections 65, 67, and 71. Section 65 deals with employer interference in unions, section 67 deals with employer interference with employees' rights, and section 71 deals with intimidation and coercion. On consent of the parties, it was agreed to adjourn the hearing of the section 91 complaints pending the outcome of these applications for certification.
- 7. In all of the circumstances, I cannot accept the finding of the majority that the immediate supervision exercised by the Department of Public Works necessitates a finding that Public Works is the employer. As the Board said in *The Tower Company (1961) Ltd.*, [1979] OLRB Rep. Jun. 583 at 584:

"The party exercising day to day control and supervision over employees is certainly a factor to be considered in determining who is the true employer. However it is only one factor among many which must be taken into account".

See also K-Mart, supra, at 662-663, Sutton Place Hotel, [1980] OLRB Rep. Oct. 1538 at 1545-1546 and 1552, Kennedy Lodge Inc., [1984] OLRB Rep. July 931 at 957, and Theatrecorp Ltd., [1992] OLRB Rep. Mar. 388 at 399, which have held generally that no particular order of priority should be attributed to the factors and that the weight to be assigned to each depends on the circumstances of each case.

8. In *The Tower Company, supra*, an application for certification filed pursuant to the construction industry provisions of the Act, the Respondent (The Tower Company (1961) Ltd. and Burjan Construction Company Ltd. Joint Venture) contracted to supply certain maintenance services to the Federal Department of Transport. The employees at issue were interviewed, hired, and paid by the respondent. However, the respondent did not have an on-site supervisor and the Department of Transport supervised the employees and kept a record of the hours they worked. The contract provided the Department of Transport with the authority to have any of the employees removed upon request. In addition to arguing that the Department of Transport was the employer, the respondent Agency argued that the employees fell within federal jurisdiction and that the Board was therefore without authority to deal with the matter. The Department of Transport

port was not a party to the action. In finding that the respondent was the employer, the Board ruled as follows:

"The party exercising day to day control and supervision over employees is certainly a factor to be considered in determining who is the true employer. However, it is only one factor among many which must be taken into account. See *York Condominium Corporation, Number 46 and/or Medhurst Hogg and Associates Limited*, [1977] OLRB Rep. Oct. 645. In the instant case, in that the respondent hired the employees and pays them and is also recognized by the contract between the respondent and the Department as their employer, we are satisfied that the respondent and not the Federal Government is their true employer, and that accordingly the Board does have jurisdiction to entertain this application".

- Similarly, in the case before us, Dare and P.F. Inc. hired the employees in question, paid them, and made the necessary statutory deductions from their paycheques, told them where, when and what time to report to work. Dare and P.F. Inc. are responsible for providing Workers' Compensation coverage to the temporary electricians and pay the necessary Workers' Compensation assessments. Dare and P.F. Inc. are also the entities which issue time cards, records of employment and T-4 slips. Dare and P.F. have sole responsibility for setting the wage rate of the employees. Further, the employees' contracts of employment with the respondents and the standing offer with the Department of Public Works recognize the respondents as the employers. The factor of imposition of discipline is of little assistance in resolving this matter since there was no evidence that any disciplinary action has been taken against any of the employees in question by either Public Works or the agencies. The employees called as witnesses perceived themselves to be employees of either Dare or P.F. Inc.
- 10. Many of the "who is the employer" cases that have come before the Board have involved complex pay arrangements which have tended to obscure the true identity of the employer. The Board has therefore adopted certain rules of thumb to help "cut through" to the reality underlying such arrangements. Thus, for instance, the entity that is superficially responsible for paying employees is not considered the employer if it is not in fact the party that bears ultimate responsibility for remuneration namely, where payments are back-charged to another entity (K-Mart, supra, at 663, Grant Development Corporation, [1993] OLRB Rep. Jan. 21 at 29. Similarly, private arrangements as to who is the employer are not determinative; rather, the Board looks through the form and appearance of the relationships to their realities (K Mart, supra, Thunderhawk Developments, [1983] OLRB Rep. Aug. 1378 at 1383).
- 11. That said, however, the complex arrangements that sometimes develop should not cause the Board to drift from the simple and usual proposition that the fact that one party is ultimately responsible for paying employees and making their statutory deductions is generally a strong indication that it is the employer (*Beer Precast Concrete Ltd.*, [1970] OLRB Rep. May 224 at 228-229). In the case before us, the temporary placement companies are the ones that pay the employees and make statutory deductions from their paycheques and in the absence of evidence of "back-charging" arrangements or other indications that Public Works Canada is actually responsible for paying the employees, we have to accept this fact as highly indicative of who is the employer.
- 12. My colleagues have argued that a temporary placement agency is similar to a hiring hall and thus cannot be an employer, in my humble opinion a real stretch of ones imagination. However, neither Dare Personnel nor Personnel Force operate like a hiring hall. The employees were not just referred, but were interviewed and had their qualifications assessed by the respondents in order to determine whether the applicants would be hired. In this respect, the personnel company acted as does any other potential employer it required potential employees to fill out employment applications, submit the required documentation (such as work accreditations, references,

and photocopies of their Social Insurance Number Cards) and, as previously mentioned, interviewed, checked references, and hired.

- 13. The company to whom the employees were referred had no role in "hiring" the employees referred other than to engage in a cursory examination of their accreditation to ensure that they were qualified of doing the work in the most threshold way. Those referred were not given an interview nor were they required to fill out applications for employment. Those referred were invariably put to work, although, as with any personnel company, an unsatisfactory employee may occasionally have to be removed by the company to which the employee was referred. Given the number of personnel company cases that the Board has dealt with over the years, it is quite legitimate to take judicial notice of the fact that this is the manner in which all personnel companies operate: namely, the company the employees are referred to can essentially have the employees removed upon demand. Nonetheless, in appropriate situations, the Board has not had a problem in finding that such companies are properly characterized as employers.
- 14. The majority's assertion that a temporary help agency is a "hiring hall", which merely engages in threshold determinations as to whether a worker has the bare threshold qualifications required to perform the job is somewhat disconcerting. Hiring halls are a phenomenon peculiar to the construction industry through which trade unions refer potential employees to job sites. This procedure is necessary in a craft-based collective bargaining system, in which the only real qualification of employment to a union company is that the employee in question be accredited, duly-recognized as a union member, and warrant being placed in the job over other out-of-work union members. As well, hiring halls have proven necessary because construction industry jobs tend to be fleeting and of short duration. The hiring hall is the place where members register to indicate that they are without work at the present time. As the Board stated in *Theatrecorp Ltd.*, *supra*, at 388:

"Hiring halls in an industry organized along craft lines can't be compared to and should not be equated with mere temporary employment agencies".

- The main problem I foresee with the majority decision is that, by likening personnel companies to hiring halls, it may preclude a finding that personnel companies could be employers in any circumstances. Such a finding would be inconsistent with previous decisions of the Board which have found personnel companies to be employers within the meaning of the Act (See, for e.g., *Templet Services*, [1974] OLRB Rep. Sept. 606). As well, there are numerous cases in which the Board has considered, based on the facts, whether the personnel company in question is the employer (See, for e.g., *K-Mart*, *supra*, *Ralston Purina Canada Inc.*, [1979] OLRB Rep. Jun. 552, *Welland County Roman Catholic Separate School Board*, [1972] OLRB Rep. Oct. 884, *Nichirin*, *supra*, *Sylvania Lighting Services*, [1985] OLRB Rep. July 1173).
- 16. It bears noting that personnel companies are in fact businesses. Their primary function is to reduce the time-consuming and expensive work companies in need of temporary employees would ordinarily have to shoulder in screening, assessing, hiring, and paying applicants. Indeed, this is the service that these companies are in the business of providing. It is here that they exercise their entrepreneurial initiative and particular expertise. Of course, the fee charged covers the salaries of employees referred. If it did not, the companies would not be in business, but would be charitable organizations. This fee can in no way be seen as a back-charging arrangement since the personnel agencies are separate corporations and not merely arms of the companies in question.
- 17. Given its mandate, the Board must be vigilant against the potential erosion of rights guaranteed under the Act that may be caused by new forms of corporate organization and contracting-out to other corporations (*Grant Development*, supra, at 27). I therefore feel that the

majority has committed a fundamental error in finding that temporary personnel companies, such as those before us in this application, do not constitute employers within the meaning of the Act.

18. For all the foregoing reasons, I would have found that Dare Personnel Inc. and Personnel Force Inc. are the employers of the employees in question. Thus, the Board has jurisdiction to deal with these applications for certification and should proceed to hear the unfair labour practice complaints involving the same parties.

1240-95-U International Union of Bricklayers and Allied Craftsmen, Local 2, Toronto, Barrie and the Ontario Provincial Conference of the I.U.B.A.C., Applicant v. Fahuki Construction Incorporated, Responding Party

 $Construction\ Industry\ -\ Discharge\ -\ Discharge\ for\ Union\ Activity\ -\ Board\ finding\ that\ lay-off\ of\ three\ employees\ and\ that\ certain\ statements\ made\ by\ foreman\ violating\ the\ Act\ -\ Reinstatement\ with\ compensation\ ordered$

BEFORE: Pamela Chapman, Vice-Chair.

APPEARANCES: Ursula Boylan and Mario Dos Santos for the applicant; Louis Lam and Lawrence Lam for the responding party.

DECISION OF THE BOARD; July 25, 1995

- 1. This is a complaint under section 91 of the Act alleging that the responding party ("the employer" or "Fahuki") has violated sections 3, 65, 67 and 71 of the Act.
- 2. The complaint as filed included a request for certification without a vote pursuant to section 9.2 of the Act with respect to an application for certification filed by the applicant on May 10, 1995 (Board file 0659-95-R). By letter dated June 23, 1995, the applicant ("the union") requested that the unfair labour practice complaint be scheduled for hearing together with the application for certification. By decision dated June 6, 1995, however, the Board had appointed a Labour Relations Officer to inquire into and report to the Board concerning the duties and responsibilities of the employees at work on the application date, due to a dispute between the parties as to the composition of the employee list.
- 3. In these circumstances, the application for certification was not scheduled together with the section 91 complaint, and at the outset of the hearing I asked the applicant whether it was still seeking a consolidation of the two proceedings. At that time, counsel for the union indicated that her client was prepared to have the Board proceed with the section 91 complaint, reserving their right to pursue the request for relief pursuant to section 9.2 depending on the outcome of the officer's examinations.
- 4. At the beginning of the second day of hearing, however, after the employer had completed its case and two of three union witnesses had been examined, the applicant asked that the Board rule on the request for section 9.2 relief in its decision on the unfair labour practice complaint, but defer implementation of any order pursuant to section 9.2 until after the officer's exami-

nations, if and when it is determined that there were at least two employees doing work within the proposed bargaining unit on the certification application date.

5. After considering the submissions of the parties concerning this request, the Board issued the following oral ruling:

At this point in the proceedings, I am not prepared to permit the union to proceed with its request for relief pursuant to section 9.2 of the Act.

Instead, I will rule, once the case is completed, on whether or not the employer has violated the Act and whether or not in that event the union is entitled to the other relief it has requested, including reinstatement of the employees. I will reserve and will remain seized on the question of whether or not the union is entitled to relief under section 9.2 of the Act until after the other issues relating to the application for certification have been resolved. At that time, the union should advise the Board if it is still seeking automatic certification pursuant to section 9.2 of the Act (depending of course on the Board finding in this proceeding that the Act has been violated), and I will make whatever directions are appropriate at that time, including the convening of a hearing if any party wishes to call additional evidence relating to that request.

- 6. Many of the facts relating to the complaint under section 91 of the Act were not in dispute.
- 7. As noted above, the application for certification was filed on May 10, 1995. While there is a dispute between the parties as to whether any of the employees of Fahuki were performing work within the bargaining unit on that date, it appears that there were at most eight employees who might be considered to fall within the bargaining unit employed by Fahuki at that time.
- 8. Fahuki is a small general contractor owned by three brothers, Louis, Joseph and Lawrence Lam, who are also the directors of the corporation. They employ two other managerial staff, Gino Lupo, who is a foreman, and Peter Woo, who was at various times in the evidence described as a foreman and as the company engineer.
- 9. Fahuki has never been unionized. An application for certification with respect to the employees of Fahuki had earlier been filed by another union, the Drywall Acoustic Lathing & Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America ("the Drywallers"), in February 1995, but it was withdrawn after the filing of a response by Fahuki.
- 10. At the time of the application for certification, and when the events complained of in this application occurred, Fahuki was engaged in work at five job sites:
 - (1) 155 Old Kennedy Road, Markham ("Old Kennedy Road");
 - (2) 4331 14th Avenue, Markham ("14th Ave.");
 - (3) 355 Premier Place, Newmarket ("Premier Place");
 - (4) 346-348 Spadina Avenue, Toronto ("Spadina Road"); and,
 - (5) 10 Royal Orchard Blvd., Markham ("Royal Orchard").

Work at a sixth site, 31 Pendrith Street, Toronto ("Pendrith Street"), was ongoing at the time of the application for certification, but had since been substantially completed.

11. The Board heard extensive evidence about the nature and the status of the jobs at these sites, which it is not necessary to reproduce here. Much of this evidence was disputed, but certain

facts emerged: all of the projects are expected to be completed by the middle of August, 1995, and in many cases are already behind schedule for completion. In addition, it is clear that much of the work on these projects, particularly those involving new construction rather than renovation, either has been, or will be, sub-contracted to various trades. Fahuki has not yet obtained any further work.

- 12. In addition, the Board heard substantial evidence about the work performed by the employees of Fahuki at these sites, which I will not review in detail. Generally, the employees working for Fahuki are engaged in general labour such as clean-up, set-up, demolition, assisting other trades, and small jobs not significant enough to merit sub-contracting. This clearly requires the employees to use a wide variety of skills, although they do not generally spend a lot of time doing one particular task so as to gain a great deal of experience in any trade. I note, however, that there was no evidence led about the tasks performed by the employees on the certification application date. For this reason, these factual findings should not be considered to have any weight with respect to the issues in dispute on the application for certification.
- On June 15, 1995, the parties met with a Labour Relations Officer of the Board to discuss the application for certification. Lawrence Lam attended that meeting on behalf of the employer, and he reported on the meeting to his brother, Louis Lam.
- 14. On the same day, June 15, 1995, two employees of Fahuki, Inmar Barton Moran ("Barton") and Walter Perez, were working at the Old Kennedy Road job site together with the foreman Lupo.
- Late in the day, after the afternoon break, Lupo was observed by these employees meeting with and having a conversation with Louis Lam on the job site. Lupo then rejoined the two employees and, according to Barton, told them that Lam wanted to know if Lupo had had any discussions with the employees about the proposed unionization. Lupo told the employees that he knew who had signed cards, but also tried to get the employees to tell him who had signed, and to confirm that they had signed. When the employees denied signing cards, he got got upset and angry, telling them that he knew they had signed. Eventually, Perez admitted to Lupo that he and Barton had signed.
- 16. Lupo told the employees that a union wouldn't assist them in any way, citing family experience with unions. When the employees disagreed with him, he made a statement to the effect that "we'll see if the union can get you a job once you are laid off". He also said that the company had many ways of avoiding unionization, including terminating the present employees and hiring new ones, and changing the name of the company.
- 17. On the following day, June 16, 1995, Barton was again at work at the Old Kennedy Road site, this time with another employee, Jose Reynal Garcia. Lupo once again approached them and began to speak about the union, saying "I guess you guys are laughing because you are with the union". When the employees said that they didn't know what he was talking about, he again claimed to know that they had signed cards. Garcia asked him why he was getting angry, given that he was not an owner of the company, and Lupo responded that he would see them to say "good-bye" if they brought in a union, and that he wished them good luck.
- 18. The evidence given by Barton and Garcia about these conversations between Lupo and the employees is unchallenged, as their testimony in this regard was not disputed during cross-examination, and Fahuki chose not to call evidence from Gino Lupo. Instead, Fahuki took the position that Lupo was not acting on the instructions of the owners, and that the company had no

knowledge of whatever was said on the jobsite. The significance of this argument will be considered below.

- 19. On Friday, June 16, 1995, the three Lam brothers met with Peter Woo to discuss progress at the various sites. At this informal meeting, which occurred at approximately 5:00 p.m. that day, they decided to lay-off three employees, Barton, Garcia, and Osmar Ortez, effective immediately. They instructed Lupo, who was not present at the meeting, to contact the three employees and advise them not to report to work on Monday.
- 20. Lupo called the three employees at their homes during the evening on Sunday, June 18, 1995, and told them not to report to the jobsite the next day and instead to go in to the office to pick up their papers for unemployment. The three employees did go to the jobsite first thing in the morning, at which time Lupo again told them to go to the office to pick up their papers. When they arrived at the office, they spoke to the receptionist, who did not know what they were talking about and contacted Louis Lam on the phone for instructions. The employee who was responsible for preparing Records of Employment, and who signed the ones eventually provided to the employees, was not present at that time. Barton, Garcia and Ortez were told to return to pick up the forms, which they did the following day.
- 21. Louis Lam testified that the lay-off of the three employees was not related to the application for certification or to the conversation between Lupo and the employees, but was motivated entirely by the need to reduce the workforce because of a lack of work.
- 22. The three employees, however, testified that there was still work to be done at the job sites at which they had been employed when they were laid off effective June 19, 1995.
- 23. The company has periodically laid off employees when work is not available. Indeed, two of the employees who were laid off on June 19, 1995 had previously been laid off temporarily. The employer admitted, however, that three employees had never been laid off together in the past. It was not disputed that these lay-offs are not always carried out in reverse order of seniority, although that appears to be a factor, as the employer may retain employees who have special skills depending on what work remains to be completed. In the present case, Barton, Garcia and Ortez are the three least senior employees but for one employee, Luis Viero Majano, who is particularly experienced in painting.
- 24. Information provided by the employer, which was not disputed by the union, establishes that since October, 1994 six other workers have been laid off by Fahuki, prior to the lay-off which is the subject of this application. One employee was laid off in each of the months of October and November, 1994, and February and March, 1995; two employees were laid off in December, 1994, on the 8th and the 12th. The employer asserts that these lay-offs, like the present ones, occurred because of a shortage of work, as the company has been slowly reducing its workforce to reflect the fact that no new projects have been obtained and the present work is close to completion.
- 25. The employer also asserted that further lay-offs will occur as the work at the current job sites is completed, unless new projects are obtained by Fahuki.

DECISION

26. The applicant claims that the employer has violated sections 65, 67 and 71 of the Act. These sections are set out below:

- 65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.
- 67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
 - (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
 - (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
 - (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
- 71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.
- Also relevant to the present application is section 91(5) of the Act, which reads as follows:
 - 91.(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.
- 28. There are two aspects to the complaint brought by the union: the allegation that the comments made by the foreman Gino Lupo to employees on June 15 and 16, 1995, constitute intimidation, coercion and/or threats contrary to the Act; and the complaint that the lay offs of the three employees effective June 19, 1995, constituted discrimination, intimidation, coercion, threats and/or the imposition of a penalty for union activity, contrary to the Act.
- As noted above, the comments made by Lupo were not disputed by the employer, and Lupo was not called to give evidence. In these circumstances, I can only conclude that the comments were made as recited by the employees Barton and Garcia. It is clear from their evidence that Lupo made statements which are in and of themselves contrary to sections 65, 67 and 71 of the Act. Lupo's questions about union involvement constitute interference with the employees' right to join a union, and in the circumstances they had an intimidating and threatening effect. Even more serious are his comments about the threat of a lay-off, which were framed in a way which suggested that the employees were at risk of termination if they supported the union. Such comments constitute threats relating to job security, and are thus clearly contrary to the Act. Finally, Lupo clearly tried to intimidate the employees by threatening them that the employer would take steps, including the lay-off of employees, to avoid unionization. In these circumstances, I must

conclude that Gino Lupo committed an unfair labour practice when he spoke in this manner to employees on June 15 and 16, 1995.

- 30. The responding party claims, however, that Lupo was not acting with the knowledge, or on the authority, of the employer if and when he made such comments. In the circumstances, such an argument cannot succeed. It was not disputed that Lupo was a foreman, directly responsible for supervising the employees on the job sites. Indeed, it was clear that the Lams had little or no contact with employees, and relied entirely on Lupo, and to a lesser extent Peter Woo, to manage them. The evidence discloses that Lupo exercised managerial duties within the meaning of the Act, and that he was perceived by the employees to wield power over them. As such, he was acting with at least the ostensible authority of Fahuki. For these reasons, I find that the comments made by Lupo constitute a violation by the employer of sections 65, 67 and 71 of the Act.
- 31. The second aspect of the union's complaint relates to the lay-off, only a few days after these comments were made by Lupo, of three employees, including two of the employees who were involved in the discussions with Lupo. The employer claims that the timing of these lay-offs was coincidental, but having reviewed all of the evidence, I do not find this assertion to be convincing.
- While the employer submits that the lay-offs occurred because of a lack of work, the evidence to establish such a shortage is quite unsatisfactory. As noted above, all of the projects were expected to be completed within two months of the lay-off, which might suggest that the work was running out, but also establishes that the employer was under significant pressure to finish work quickly. Substantial amounts of work remained at a number of the sites, which the employer was considering, but had not yet committed to, sub-contracting. Indeed, Lam testified that at the Old Kennedy Road site the employer was under such pressure to finish the job that it was no longer sure it would be able to complete the required work on its own, and might have to consider sub-contracting work which it had previously intended to complete using Fahuki employees. The work remaining at the time of the lay-offs included tasks such as painting, drywalling and landscaping, which Fahuki employees had done in the past.
- 33. The evidence called by the employer concerning a shortage of work also does not explain the timing of the terminations. No particular projects were completed the week prior to the lay-offs, and indeed the specific tasks that the three terminated employees were working on at the end of Friday, June 16 had not been completed. In particular, it was the unchallenged testimony of the employees that the carpentry work involved in building the pulpit at the church at Old Kennedy Road, on which two employees and the foreman had been working, would take at least two further weeks to complete. Similarly, it was not suggested that the work gluing insulation at the 14th Avenue site was completed at the time of the lay-off. There is no specific explanation, therefore, of the decision at that time to reduce the size of the workforce, particularly to such a large degree (three out of eight workers). The employer argues that the timing does not raise the spectre of anti-union animus, as several weeks had passed since the filing of the application for certification. The union argued plausibly, however, that it may only have been at the meeting that the employer realized that the union was not intending to abandon its application, given its previous experience in February, 1995, with the application by the Drywallers.
- 34. In the circumstances, therefore, I am not satisfied with the explanation for the lay-offs provided by the employer. The Board has long held that anti-union animus does not have to be the sole or even the predominant reason for activity complained of in order for a violation of the Act to be found. Given the absence of a credible explanation and having regard to the timing of the lay-offs, following so soon after the meeting with the Labour Relations Officer and immediately

after the threats made by Lupo, which included references to lay-offs, I cannot conclude that the decision was free of anti-union motivation.

- 25. Louis Lam testified on behalf of the employer that the decision to terminate the employees was not motivated by anti-union animus, but it was clear from his testimony that a number of other members of management had input into the decision. He also claimed not to have discussed the union campaign, or the imminent lay-off, with Lupo, prior to the decision, but we have no knowledge of what discussions the others present at the meeting where the decision was made may have had about the union's application, with Lupo or otherwise. Equally, we do not know whether anti-union animus played a role in the decision of the other two Lam brothers, or of Woo, to terminate these three workers. Woo's role is of particular concern, given that he, according to Lam, advised the others that there was insufficient work to maintain the full workforce. Woo was not called to testify, so I have no knowledge of the extent to which he shared Lupo's views about unionization, and/or discussed it with him. As it seems clear from the comments made by Lupo, however, that he had knowledge of the application for certification, it is likely that he had discussions with some member of management.
- 36. Given these gaps in the evidence about the decision, and in light of my conclusions concerning the alleged shortage of work, I have concluded that the employer has not met its onus pursuant to section 91(5) to establish that it did not act contrary to the Act by demonstrating that the lay-offs were not motivated by anti-union animus. I find, therefore, that the employer violated sections 65, 67 and 71 by terminating Barton, Garcia and Ortez effective June 19, 1995.
- 37. Having regard to the findings reviewed above, the Board orders that the responding party:
 - (1) post immediately copies of the attached notice marked as "Appendix", in conspicuous places at its office and on each active job site, where they are likely to come to the attention of employees, keep the notices posted for sixty consecutive working days, and take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material; and,
 - (2) immediately reinstate in employment Inmar Barton Moran, Jose Reynal Garcia and Osmar Ortez, and compensate them for all real losses suffered as a result of their lay offs.
- 38. The Board will remain seized of this matter in the event the parties are unable to agree on the exact amount of compensation, and in any event with respect to the request for relief pursuant to section 9.2 of the Act, as noted in paragraph 5 above.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD,
ISSUED AFTER A HEARING ARISING OUT OF THE EFFORTS OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED
CRAFTSMEN, LOCAL 2 TO BECOME THE COLLECTIVE BARGAINING AGENT FOR OUR EMPLOYEES. THE ONTARIO LABOUR
RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY CERTAIN STATEMENTS MADE BY FOREMAN GIND
LUPO TO EMPLOYEES ON JUNE 15, 1995 AND 16, 1995, AND BY THE LAY-OFF OF INMAR BARTON MORAN, JOSE REYNAL
GARCIA AND OSMAR ORTEZ ON JUNE 19, 1995.

THE BOARD HAS ORDERED THAT WE REINSTATE THESE THREE EMPLOYEES IMMEDIATELY, AND THAT WE COMPENSATE THEM FOR THEIR LOSSES ARISING FROM THE LAY-OFF.

THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS:

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES:

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION:
TO ACT TOGETHER FOR COLLECTIVE BARGAINING:

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS:
WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

FAHUKI CONSTRUCTION INCORPORATED

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED THIS 25TH DAY OF JULY, 1995.

4399-94-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173, Applicant v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Locals 105, 257, 357, 461, 467, 580, 582 & 634 and **Famous Players Inc.** and Cineplex Odeon Corporation et al., Responding Parties

Union Successor Status - Board satisfied that signing merger agreement following ratification by members and that process of transferring "projectionist" members from various locals of IATSE to Local 173, effecting transfer of "projectionist" jurisdiction in sense contemplated by IATSE constitution and within meaning of section 63 of the Act - Board declaring Local 173 to have acquired rights, privileges and duties of predecessor IATSE locals in respect of "projectionists"

BEFORE: R. O. MacDowell, Alternate Chair.

APPEARANCES: B. Fishbein for the applicant; Harry Freedman for Famous Players Inc.; Brian Wylynko for Cineplex Odeon Corporation.

DECISION OF THE BOARD; July 20, 1995

In order to make this decision easier to read, the unions and employers involved in the case, will sometimes be referred to in abbreviated form. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada will be referred to simply as "IATSE", or "the parent union". "Local unions" chartered by IATSE will be referred to by their Local union number - for example, the applicant is "IATSE Local 173". The responding employers that are opposing this application will be referred to individually as "Famous Players" and "Cineplex Odeon", and collectively as the "objecting employers". The employers that are not opposing the application will not be separately identified.

I

- 2. This is an application under section 63 of the *Labour Relations Act*. IATSE Local 173 claims that, as a result of an internal union re-organization (to use a neutral term for the moment), Local 173 has become the "successor" of Locals 105, 257, 357, 461, 467, 580, 582 and 634. Local 173 urges the Board to declare that it has therefore acquired the rights, privileges and duties under the *Labour Relations Act* of these various "predecessor" local unions. Section 63 reads as follows:
 - 63.- (1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.
 - (2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.
 - (3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

- 3. A hearing in this matter was held, in Toronto, on June 28, 1995. Notice of that hearing was given to all of the employers and all of the employees potentially affected by the declaration sought by Local 173.
- 4. Of the 20 employers listed on Schedule "A" to the application, only Famous Players and Cineplex Odeon appeared to oppose it. The National Arts Centre replied that it operated in federal jurisdiction, and thus proposed to take no part in the proceeding. The other named employers raised no objection; so, as far as they are concerned, this application is unopposed.
- 5. None of the employees or union members potentially affected by this application appeared at the hearing to raise any objection to the declaration sought by Local 173. Two individuals did write to the Board prior to the hearing: one to indicate that he had not been an employee at the time of the internal re-organization on which the application is based, and another to indicate only that he was opposed to being represented by Local 173.
- 6. However, in the absence of evidence or elaboration, I am unable to say much more than that and, in particular, whether either of these individuals actually are "projectionists" who might be affected by the transaction under review, or whether they are actually employees in any of the bargaining units to which a section 63 declaration might apply. It is not clear whether either of these individuals was on the union's membership rolls at the relevant time; and there is some indication in the documentary material before me, that they might not have been union members (although I was also told that there is a lot of sporadic or part-time employment in the industry). There is no reason given for the opposition recorded, and no objection taken to the constitutional process that Local 173 undertook in an effort to become the successor of its sister locals. In the circumstances, therefore, I am not inclined to give these submissions much weight. All that can really be said is that two persons in Thunder Bay do not wish to be represented by Local 173 in their relationship with whoever employs them from time to time (they are not necessarily employees of Famous Players or Cineplex Odeon).
- 7. On the other hand, it is evident that the majority of union members support both the re-organization process undertaken by IATSE and its named locals, and the result which Local 173 seeks to confirm by a declaration under section 63 of the Act. Similarly, this application is supported by all of the local unions involved, and by the parent union and its executive board. And of the employers named in the application, only Famous Players and Cineplex Odeon were opposed.
- 8. The background is not substantially in dispute. However, before reviewing those facts, it may be useful to record some of the provisions of the union constitution to which reference will be made later:

ARTICLE TWO

Government

Section 2. Convention

The supreme governmental powers of this Alliance and its constituent members shall be vested in its duly elected delegates in Convention assembled and when the Convention is not in session, in the International Officers duly elected by the delegates or appointed in accordance with the laws herein provided.

* * :

Section 4. Local Unions

Each affiliate local union, subject to the laws of this Alliance, shall exercise full and complete control over its own membership and affairs.

This provision shall not be construed to confer upon local unions the power to enact laws inconsistent with any portion of this Constitution and By-Laws.

ARTICLE SEVEN

The International President

Section 6. Interpret Constitution and By-Laws

The laws of this Alliance as contained in this Constitution and By-Laws shall be interpreted by the International President and his decision thereon shall be binding upon all individual members and affiliated local unions of the Alliance until amended or reversed in the manner hereafter provided.

The International President shall render decisions upon questions of law where the Constitution and By-Laws contain no express provisions for the determination thereof. His ruling upon such questions shall be made in conformity with the spirit and substance of the Constitution and By-Laws and with regard to the equities of the circumstances.

Any decision of the International President, rendered pursuant to the provisions of this Section, shall be subject to appeal to the General Executive Board in the manner provided hereafter in Article Seventeen.

ARTICLE TWENTY-SIX

Definitions

Section 6. Jurisdiction

The term "jurisdiction" as used in this Constitution and By-Laws shall be construed to mean the sphere of control over employment in certain crafts within certain defined geographical areas.

ARTICLE EIGHTEEN

Charters

Section 9. Jurisdiction of Charters

- a. The working jurisdiction of affiliated local unions shall be expressly limited to that defined by the charters issued to them respectively by the Alliance.
- b. Unless otherwise provided by the charter issued by the Alliance to a local union, its geographic jurisdiction shall include the territory extending in any direction halfway to the nearest affiliated local union of the Alliance.
- c. When a new charter is issued by this Alliance, all members of affiliated local unions employed within the jurisdiction of such new local union must, within a period of ninety (90) days, transfer from their former local union and take out membership cards in the newly chartered local union; provided, however, that such members shall not be obliged by the new local union to pay an initiation fee in excess of Five Dollars (\$5.00). Members failing to transfer as herein provided shall be obliged to withdraw from the jurisdiction of the new local union at its demand.

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f. If an affiliated local union fails or refuses to order its members to withdraw from the jurisdiction of another affiliated local union when ordered to do so by the International President, the local union in whose jurisdiction the member is working may file a charge with the International President against the home local and if the home local is found guilty of such charge after trial, it shall be subject to such penalty as the International President shall deem appropriate.

Section 10. Classes of Charters

- a. Stage Employees. Full and direct stage employees' charters shall be construed as conferring jurisdiction upon the local unions to which they are issued over stage carpenters, property persons, stage electricians and all other stage employees; subject, however, to such other classes of charters as have been or may be subsequently issued by the Alliance.
- b. Moving Picture Machine Operators. Full and direct moving picture machine operators' charters shall be construed as conferring upon the local unions to which they are issued by the Alliance jurisdiction over all employees of operating rooms and operators of apparatus and any connections appertaining thereto in locations where moving pictures are exhibited and also over the operators of all spot lights in conjunction with moving picture exhibitions, when such spotlights are located within the operating room or moving picture booth, and further confers jurisdiction over the operators of all stereopticons, within moving picture booths in all cities. This jurisdiction shall not apply to the operating of stereopticons outside a moving picture booth in connection with a show as a stage effect. No member of a moving picture machine operators' local union shall be permitted to operate any stage lights, scenery, or curtains from the front of the theatre operated by remote control or otherwise, where operation would displace a stage employee.
- c. Mixed Charters. Mixed charters shall confer upon the local unions to which they are issued the right to accept into membership any person qualified to hold any of the various positions in a theatre which are within the jurisdiction of the International Alliance. Members of such local unions are permitted to accept any position within the territorial jurisdiction of the local unions, either on the stage or in the moving picture booth, and are also permitted to go on tour in the capacity of stage employees or moving picture machine operators.

[and many other craft subdivisions]

Section 13. Transfer of Members or Mergers

Subject to ratification by the International President, two or more affiliated Local Unions shall have the right to transfer all or part of their respective membership to any one of such Local Unions provided that such action is first approved by secret vote of a majority of the members in good standing in attendance and voting at a regular meeting of each affected Local Union. Notice of such contemplated voting shall be sent by mail to every member at least fifteen (15) days prior to such meeting of the Local Union.

9. Of course, the employers have no rights or duties under the *union* constitution, nor could they press a claim under the constitution. Only a member of the union could do that. And, strictly speaking, the issue before the Board is whether in all the circumstances it should declare that the applicant has or has not acquired the rights, privileges or duties under the *Labour Relations Act* of the named local unions. The Board is not usurping the function of the courts to enforce the union constitution or adjudicate the rights of members *inter se* (which as noted, are not being debated by the members in any event). The Board is merely deciding whether one union should be substituted for another as the employees'/members' statutory bargaining agent. Nevertheless, what the union did and how it did it are obviously relevant to the Board's task under section 63.

many trade unions, IATSE is subdivided for administrative and collective bargaining purposes into smaller "local" unions, that cover a specific geographic jurisdiction and one or more classes of employees.

- 11. IATSE and its chartered locals are all "trade unions" within the meaning of section 1 of the *Labour Relations Act*. They are all employee organizations formed for purposes that include collective bargaining. A local union remains a distinct "trade union" under the Act, even though it is affiliated and subordinate to a parent union body.
- 12. IATSE is a "craft union" that is, it commonly represents employees with defined skills; and in IATSE's case, those workers and skills commonly are employed in the entertainment industry (see section 6(3) of the Act). What IATSE means by its "jurisdiction" is set in Article 26(6) of the union constitution, as amplified by Articles 9 and 10. Those provisions describe the geographic jurisdiction of local unions that are chartered by IATSE, and the classes of employees who may be grouped under the umbrella of a single chartered local.
- Apart from having a geographic territory, an IATSE local union may encompass a particular group of skilled members (stage employees, projectionists, camera persons, laboratory film/video technicians, make-up artist, etc.). Alternatively a chartered local may be constituted as a "mixed local" that offers membership to anyone qualified to hold any of the various positions in a theatre that are within the "jurisdiction" of IATSE. As its name suggests, a mixed local is an umbrella organization that embraces members with different skill sets.
- All of the locals involved in this proceeding are governed by the IATSE constitution. That constitution gives the parent union considerable latitude to regulate the union's internal structure and affairs of the union. For example, Articles 19(21) and 19(29) [not reproduced above] permit the International President to settle any dispute between locals respecting their respective jurisdictions, and even to merge locals without a vote of the members concerned.
- 15. With two exceptions, all of the locals involved in this proceeding are "mixed locals" with a defined geographic jurisdiction (territory) but diverse membership. Their respective territories can be summarized schematically as follows:

Local 105 - (mixed local) - London & Sarnia area

Local 357 - (mixed local) - Kitchener, Waterloo, Guelph, Cambridge &

Stratford area

Local 461 - (mixed local) - St. Catharines & Niagara area

Local 467 - (mixed local) - Thunder Bay area

Local 580 - (mixed local) - Windsor area

Local 582 - (mixed local) - Brantford area

Local 634 - (mixed local) - Sudbury & North Bay area

- 16. One of the exceptions is Local 257 (Ottawa, Brockville & Cornwall area) which is composed solely of projectionists. The other exception is Local 173 itself, which has jurisdiction with respect to moving picture operators and projectionists in the Toronto, Peterborough, Kingston and Belleville areas.
- 17. The present rather broad reach of Local 173 results from an earlier merger or transfer of jurisdiction involving the former Local 528 of IATSE, which once operated in Kingston and Belleville. That merger/transfer of jurisdiction expanded Local 173's previous territory to include Kingston and Belleville, and was the subject of an earlier application to the Board pursuant to what was then section 62 [now 63] of the Act. In that earlier application Local 173 was declared to

be the successor of Local 528 for projectionists in these geographic areas (see the decisions of the Board in Files 1298-91-R and 0607-92-R).

- 18. I will have more to say later about the Board's decision in OLRB File No. 1298-91-R. For present purposes, it suffices to note that Local 528 was a "mixed local" which some years ago purported to transfer its "projectionist jurisdiction" in Kingston and Belleville to Local 173; and the Board subsequently issued a declaration confirming the expansion of Local 173 and its status as a "successor" under section 62 [now section 63] of the Act.
- 19. With the exception of Local 173, each of the geographic locals mentioned above, represents a relatively small number of members and an even smaller number of projectionists. Many of the locals have been decreasing in size, and, as a result, have been finding it difficult to administer themselves or engage effectively in collective bargaining negotiations. By contrast, employers such as Cineplex Odeon or Famous Players have a national presence and can present a unified front at the bargaining table, playing upon any apparent union weaknesses at the local level.
- 20. This is obviously an undesirable situation from the union members' point of view; and, as a result, with the encouragement of the parent union, there have been numerous local meetings to discuss the desirability of an overall merger of the various locals, or the transfer of the "projectionists jurisdiction" from the mixed locals to a single larger "projectionist local" that would cover most if not all of Ontario. The logical recipient of that expanded authority was Local 173, which already represented projectionists in a number of theatres in the Toronto Peterborough Kingston Belleville areas, as a result of the earlier re-organization involving the now defunct Local 528.
- 21. After many meetings between representatives of IATSE and its various locals, it was eventually decided that the projectionist members would be better served if the smaller pure projectionists' locals were merged into Local 173, and if the mixed locals' jurisdiction over projectionists were transferred to Local 173. An agreement to that effect was concluded on March 23, 1994. It reads as follows:

MERGER AGREEMENT

The undersigned locals of the I.A.T.S.E. each agree with the other to amalgamate or merge with or transfer their projection jurisdiction to Local 173 on the terms and conditions attached hereto and to recommend approval to their membership at meetings held in accordance with the I.A.T.S.E. constitution.

DATED at TORONTO this 23rd day of March, 1994.

This agreement [attached schedules omitted] was intended to conform to section 63 of the Labour Relations Act, and was signed on behalf of each of the local unions involved in this proceeding. It was also signed by IATSE Local 303 (Hamilton) which is not involved in this proceeding.

- 22. The proposed re-organization (merger, amalgamation or transfer of jurisdiction as the case may be) was considered by the membership of each local union, at a local union meeting called for that purpose. Except for Local 257, notice that the proposal would be discussed and voted upon was sent at least 15 days prior to the date of the meeting. In the case Local 257, notice was sent 12 days in advance of the meeting because of some difficulties in arranging for a suitable meeting place. None of the members of these locals has complained that the notice or voting process were inadequate in any way.
- 23. In each case, a secret ballot was conducted to poll the members wishes with respect to

the proposal mentioned above. At each local meeting, a majority of the members present voted in favour of the proposed re-organization - which in the case of the mixed locals was intended to transfer "jurisdiction" over projectionists and existing projectionist members to Local 173, and in the case of Local 257, a pure projectionist local, was intended to merge Local 257 and its membership with Local 173. In other words, the agreement that had been signed and confirmed by the local union officials in March 1994, was ratified by each local union's membership in accordance with its terms and what the participants all thought was required by the IATSE constitution (and section 63 of the *Labour Relations Act*). They were doing on a larger scale, what Local 173 and Local 528 had done some years ago.

- It is important to note therefore, that no member of the union has challenged or questioned either the process undertaken by the parent and local unions, or the ultimate result. No member asserts that there is any constitutional defect in what was done, nor has there been any challenge of that kind filed under the union constitution, or any protest to the executive board, or any action in any court. So far as I can determine on the evidence before me, the members of the union are content with both the process and the result which, as noted, was intended to strengthen their hand at the bargaining table, and facilitate dealing with (among others) the large national employers who are objecting to the re-organization. The objective of the re-organization are consistent with the purposes of the union set out in Article 1(2) of its constitution.
- 25. The membership of Local 303 (Hamilton) did not approve the proposed re-organization, and in consequence, that local retains its projectionist members and its jurisdiction over projectionists in the Hamilton area. For that reason, Local 303 is not a party to these proceedings.
- 26. I should also reiterate that this is not the first time that the union has purported to effect a merger or "transfer of jurisdiction" in the manner described above. It has been done this way on a number of occasions in Canada and the United States, without any problems or protests from members or from employees.
- One example that I have already mentioned concerned Local 528 in Kingston, that was once a "mixed local" which had both a projectionist and stage jurisdiction i.e. members who had these skills or trades. Local 528's projection jurisdiction was transferred to Local 173 in Toronto. Its stage jurisdiction was transferred to Local 471 in Ottawa. Both transactions were the subject of applications for a successor trade declaration, made pursuant to what was then section 62 [and is now section 63] of the Act, and in both instances, declarations were granted by the Board without any controversy (in June and July 1992 see Board File No. 1298-92-R and 0607-92-R).
- 28. Indeed, the transaction involving Local 528 deserves further examination, because it appears to have been both legally and factually identical to the one currently under review, and was considered by the Board in File No. 1298-92-R where the responding parties were Cineplex Odeon and Famous Players. Not only has IATSE undertaken a transfer of projection jurisdiction before, but the objecting employers were involved before.
- 29. In Board File 1298-92-R, the Board had before it a transaction in which Local 528 had supposedly transferred its projectionist jurisdiction to Local 173 in much the same manner that the various Locals in the instant case are trying to do now. The responding employers in that file were Famous Players and Cineplex Odeon. But in this earlier instance, Cineplex Odeon and Famous Players did not raise any objection to the request for a successor rights declaration, which was eventually granted by the Board. And thereafter, Local 173 possessed whatever rights or obligations under the Act it had inherited from Local 528.
- 30. In short, in each of these earlier files, the Board made a successor union declaration

where there was a re-organization similar to the one undertaken in this case (albeit a more limited one); and in each case the re-organization was undertaken pursuant to Article 18(3) of the IATSE constitution, which is what the union parties thought was the proper foundation. In each of these earlier files the Board made a successor rights declaration. And in one of those earlier cases, Famous Players and Cineplex Odeon were both involved as parties to the litigation, but raised no objection to the declaration sought by Local 173.

- Local 173 contends that these objecting employers cannot now oppose an identical transaction which, as before, involves a merger or transfer of jurisdiction undertaken under Article 18 of the union constitution. Counsel points out that the Board has already made a successorship declaration based upon the union's reading of its constitution, and the Board made that determination in a proceeding where Famous Players and Cineplex Odeon had an opportunity to litigate any alleged constitutional irregularities. But they chose not to raise any objections at all.
- 32. At this point, I do not propose to discuss whether the issues now raised by the objecting employers are precluded by the doctrines of "res judicata" or "issue estoppel", or whether those doctrines are applicable to what might be described as a "default judgement", or whether in any event, they are principles that bind the Board in the exercise of its authority to administer the Labour Relations Act. At this point, I note only that what the unions claim is a valid transfer of jurisdiction, has been undertaken on numerous occasions in the past without objection, has been sanctioned by the Board before under the successorship provisions of the Act, and on at least one occasion has been accepted without objection by Famous Players and Cineplex Odeon.
- 33. In other words, the union's proposed interpretation of its Constitution is consistent with the way that it has done things in the past, without complaint from its members or employers including the present objectors. And whatever weight is ultimately given to constitutional convention or the union parties' intentions, there is really no dispute about that constitutional practice or what the members and officers of the parent and local unions were trying to accomplish: a larger more effective bargaining agent for projectionists. Nor is this a case like Astgen v. Smith [1970] 1 O.R. 129 or The Great Atlantic and Pacific Company of Canada Limited [1993] OLRB Rep Sept. 885, where it was union officers and members who were challenging the constitutional propriety of what had been done. Here, there is no quarrel within the union family about what their constitution means or permits.

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34. Before returning to the terms of the union constitution and the internal restructuring under review, it may be useful to briefly record what section 63 is for, and why it is necessary.

- 35. At common law, a trade union was an unincorporated association of workers who banded together to promote their common objectives, and bound themselves to each other in accordance with terms spelled out in the union constitution. The union, as such, had no legal existence separate from its members. The union was its members, who were bound together in a contractual matrix. At common law, a union was a kind of "club" a so-called "voluntary association" in which membership rights were contractual in nature, and could be determined with reference to the union constitution (and perhaps by the "custom and practice of the trade").
- 36. However, under the *Labour Relations Act*, a trade is not like that at all. Under the Act, a union *does* have an identity distinct from its members, as well as statutory rights and obligations which obtain regardless of the terms of its constitution or the wishes of the members. Under the

Labour Relations Act, a union is defined as a collective bargaining mechanism (see section 1 of the Act). That is its fundamental or defining characteristic from a statutory point of view; and that is the only thing that its constitution must clearly specify.

- 37. From a statutory perspective, the primary focus is on the union as exclusive (statutory) bargaining agent for a group of employees (not just members) who work for an employer. Under the Labour Relations Act, the union is the entity that can acquire and exercise bargaining rights in respect of those employees. The Act is not much concerned with internal union affairs, the rights of union members qua members, or the relationship of members to each other. In fact, for some statutory purposes including the creation of bargaining rights the Act has a rather special definition of "membership", that may not even conform to the definitions in the union's constitution (see sections 8 and 105 of the Act).
- 38. Under the *Labour Relations Act*, a union can acquire bargaining rights on behalf of members and non-members alike (indeed, based on mere applications for membership again see section 8); moreover, it can retain those bargaining rights regardless of the subsequent ebb and flow of membership, or the change in the number or composition of the employees in the bargaining unit it represents. A trade union can even exact dues from persons who are not its members and can *compel* membership as a condition of employment. In this regard, the union may not be a "voluntary association" at all.
- Under the Labour Relations Act, a trade union has statutory obligations in respect of members and non-members alike (see section 69 of the Act), and in many of its most important decisions a strike for example it may be obliged to seek the consent of employees who are not members (see section 74 of the Act). In short, under the Labour Relations Act, a trade union is not at all like the "voluntary association" of workers contemplated by the common law. Nor, for the most part, is the statute particularly concerned with the internal affairs of a trade union the way a union is organized or run, eligibility for office, the incidents of membership, the ownership and disposition of assets, and so on. The internal affairs of the union are a matter for its members to govern as they see fit under the terms of their constitution (some exceptions are sections 74(4)-(6), sections 84-89, and the recently added sections 138.1 138.6.) And whatever the "status" of a trade union at common law, union institutions play a critical role in a statutory scheme designed to foster statutory objectives (see section 2.1 of the Act).
- 40. But there is at least one situation in which the union's internal re-ordering could have an impact on its role as bargaining agent, and could generate difficulties for an employer and that is where there has been some change in the actual *identity* of the union bargaining party, or some alteration of its apparent authority to bargain on behalf of the employees it represents. It is in those circumstances that section 63 can be applied to clarify the situation and to ensure that orderly collective bargaining can continue, despite a re-organization on the "union side of the bargaining table". (Section 64 plays a similar role where the sale of an employer's business creates a change on the "employer side" of the bargaining table).
- 41. Collective bargaining under the Labour Relations Act presupposes a single, identifiable, union entity that can exercise the rights and perform the obligations of the employees' exclusive bargaining agent. That is why section 43 of the Act requires a specific recognition clause. The scheme of the Act also envisages an independent trade union actor, that engages in collective bargaining on behalf of employees, free from employer influence. An employer is precluded from negotiating with anyone other than the union that is the exclusive bargaining agent representing employees in a bargaining unit (see section 67 of the Act), and an employer is also precluded from participating in or interfering with the internal workings of a union (see section 65 of the Act). The

internal organization of the union is the union's own affair, and the employer can have nothing to do with it.

- 42. It follows however, that an employer should be entitled to know, with some precision, just who the exclusive bargaining agent is, as well as its authority to represent the employer's employees. The unilateral restructuring of the union bargaining party should not disrupt or obscure the established collective bargaining framework including the precise identity of the entity with which the employer must bargain. And if there is some question about that, the employer should be able to demand confirmation of that identity through an appropriate procedure under the Act.
- 43. If an employer is obliged by statute to grant exclusive recognition, it is entitled to know who it is required to recognize. Its established collective bargaining relationships should not be disrupted by uncertainty or by competing claims (as in A & P above, where two union organizations both claimed to represent the employees in question, and the employer was caught in the middle).
- 44. Ordinarily, the identity of the bargaining agent is sorted out and fixed on an application for certification, in which a parent trade union or a local is "certified" by the Board as the exclusive bargaining agent for a defined group of employees. Such certification applications can occur in an unorganized setting where employees are choosing a union for the first time, or in a situation where one union seeks to displace another in which case only one of them will ultimately be declared to be the employees' exclusive bargaining agent. In either case, a particular union emerges as the entity with which the employer must deal and the selection turns upon the wishes of employees.
- Now, it is conceivable that one local union could "raid" a sister local in this way, and thereby seek to acquire bargaining rights by certification. In this case for example, IATSE Local 173 could apply for certification in respect of the employees currently represented by each the other named locals. Alternatively, the parent union itself could apply for certification to displace each of its own locals bearing in mind that the employees in each bargaining unit represented by a local are already members of both the local and the parent union. Certification could be used to accomplish what the unions seek to do under section 63; and if that route were taken, the unions' internal constitutional arrangements would be largely irrelevant.
- More commonly, though, when a parent union or related locals seek to re-organize or revise their bargaining structure, they do not raid each other in this way. Since the situation involves an internal reordering within the union family, the claim is usually based upon a purported "merger, amalgamation, or transfer of jurisdiction", which is then considered under section 63 of the Act. Section 63 provides an alternative vehicle by which a union can acquire (in a sense "inherit") the status of statutory bargaining agent.
- 47. That is what has allegedly happened in this case; and the Board must therefore determine whether what the unions have done is sufficient to warrant a declaration that Local 173 is the successor. To put the matter colloquially: the Board must determine whether IATSE Local 173 now "stands in the shoes" of each of the other local unions.
- 48. It is important to appreciate, however, that a declaration under section 63 of the Act does not change the terms of any collective agreement, or the terms and conditions of employment for any employees, or the collective agreement obligations of any employer. Nor does a section 63 declaration alter the internal arrangements of a trade union or settle the rights of members qua members in relation to each other that is an issue for the courts to resolve should a member choose to raise it. A declaration under section 63 merely confirms that one union entity has

acquired the rights, privileges and duties under the *Labour Relations Act*, formerly held by another union entity, described as its "predecessor".

49. A section 63 declaration identifies and confirms the status of the union with which the employer must bargain. It does not change the terms of the bargain, or create any new rights or responsibilities - other than an obligation to recognize the union declared by the Board to be the successor. To repeat the metaphor mentioned above: a trade union declared to be a successor under section 63, merely "stands in the shoes" of the union that was there before. It has no additional rights or duties; nor does the employer.

IV

- Both counsel drew my attention to a number of Board cases involving the application of section 63 in particular, the recent decision of the Chair in the *Great Atlantic and Pacific Company of Canada Limited*, [1993] OLRB Rep. Sept. 885 (see also *The Bay*, [1993] OLRB Rep. Dec. 1350) which itself contains a review of many of the cases. I do not think that it is necessary to duplicate that analysis here. It suffices to say that, viewed as a whole, the cases under section 63 [formerly 62] illustrate two Board concerns:
 - (1) that the underlying transaction (the "merger, amalgamation or transfer of jurisdiction") must have been undertaken in substantial (if not complete) compliance with constitutional norms; and,
 - (2) that the result must generally reflect the wishes of the *employees* who may be affected by it.
- 51. This second consideration flows from the nature of the exercise under section 63, which, as I have already mentioned, is rather different from what a court would undertake when adjudicating membership rights under the union's constitution. Section 63 contemplates that even if a trade union has complied with its constitutional requirements, the Board still has a discretion to declare whether or not the entity which is the "successor" (the words of the statute) has or has not acquired the statutory rights and obligations of the predecessor bargaining agent.
- The way in which section 63 is framed underlines the fact that section 63 is not fundamentally about membership rights *inter se*, the distribution or ownership of assets, and so on. It is about substituting one statutory bargaining agent for another, and the assumption of statutory rights and duties including rights and responsibilities in respect of *employers* and *non-member employees* who are not bound by the constitution at all, and thus have no right to participate in constitutional processes. That is why the Board has a discretion to take into account the labour relations purpose and ramifications of the positions urged upon it, and can consult the employees affected (not just the union members) by means of a representation vote (see section 63(2) of the Act).
- To put the matter starkly: a trade union may well decide to merge etc. with another organization, or transfer jurisdiction over certain of its members and the employees it represents; and such "predecessor" union may haven taken all of the steps under its constitution necessary to accomplish that objective. However, a trade union cannot transfer bargaining rights and obligations without the imprimatur of the Board under section 63 of the Act. Statutory rights and obligations of this kind are not union "assets" capable of unilateral transfer.
- 54. With these general observations, I return to the terms of section 63 of the Act and the terms of the IATSE constitution. The first thing that must be considered is whether those terms

are congruent, and whether what the unions did under their constitution meets the requirements of section 63.

- 55. Under section 63 of the Act, the terms "merger" or "amalgamation" connote the joining of two union bodies so that they become one. By contrast, the term "jurisdiction" is an elastic one, that can be used in a variety of senses, and takes its colour from the context in which it is used. It is undefined in section 63 and thus open to interpretation.
- 56. Under the union constitution, of course, the word jurisdiction means "the sphere of control over *employment* in certain *crafts* within certain defined *geographic* areas". That is how the constitution defines it. The question is whether the word "jurisdiction" means something different under section 63 of the Act or more accurately, whether the word "jurisdiction" in section 63 can *encompass* the constitutional meaning, so that a merger etc. under the IATSE constitution can provide the foundation for a section 63 declaration.
- 57. I might observe, parenthetically, that there is nothing novel about the union's concept of "jurisdiction". Just as the "jurisdiction" of a court may be defined by reference to geography or subject matter, "local" trade unions may assert "jurisdiction" in particular geographic areas, and have "jurisdiction" to represent workers in particular industries or workers who do particular jobs in those geographic areas. Such assertions of organizing territory are quite common in the trade union world and often evident in name of the union (United Steelworkers of America, United Brotherhood of Carpenters and Joiners). So it is for IATSE, which, as its name suggests, organizes and represents employees in the theatre and motion picture industry. And as noted above, IATSE locals also have a defined geographic jurisdiction.
- 58. In *Industrial and Labour Relations Terms: A Glossary* (5th edition 1989 Cornell University), the word "jurisdiction" is defined this way:

"The area of jobs, skills, and industries within which a union organizes and engages in collective bargaining. International unions often assert exclusive claim to particular areas of employment."

That is a commonly understood meaning of the term when used in industrial relations parlance, as well as the meaning that one finds in the IATSE constitution.

- 59. Is there any reason to give the word "jurisdiction" a different meaning under section 63 of the *Labour Relations Act*? I do not think so. In my view, the statutory term is broad enough to encompass that meaning, as well as and the notion of jurisdiction spelled out in the union constitution. Indeed, that is the meaning suggested by other provisions of the Act where the word "jurisdiction" is used.
- 60. Where there is a "jurisdictional dispute" between two unions that is, a claim by one union that work within its jurisdiction is being done by members of another union the Board can sort it out under section 93 of the Act. Under section 138.1 of the Act, the term "jurisdiction" is defined to *include* "geographic, sectorial, and work jurisdiction" -in other words, a definition very similar to that found in the IATSE constitution. And section 138.3 limits the extent to which certain parent unions can tinker with a local union's "jurisdiction ... whether it was established under a constitution *or otherwise* ...".
- 61. Now, no doubt the definition set out in section 138.1 is applicable only in that part of the Act. However, it is an inclusive definition, and there is no reason to give the term "jurisdic-

tion" a different meaning when used elsewhere in the Act. Certainly, there is no indication that the Legislature intended some narrower meaning in section 63.

- It is also interesting to note the presence of the phrase "or otherwise" appearing in section 138.3; since, in section 138.3 the Legislature is clearly addressing its mind to union practice, union constitutions, and the relationship between parent and local union bodies. It seems to me that the presence of this phrase "or otherwise" indicates the Legislature's recognition that, under the statute at least, the union's "jurisdiction" may not be determined exclusively by the terms of the union constitution, but may have to be gleaned from the union's custom and practice. In other words, a pretty fundamental aspect of the union's organization its "jurisdiction" may not be apparent in the "contract" that at common law binds the members together. (See also section 105 of the Act which permits the Board to consider how the union actually operates, not merely the strictures of the union constitution).
- I am satisfied that under section 63 of the Act, the word "jurisdiction" is a term which can encompass the wide variety of ways in which a trade union chooses to define or subdivide its organizational territory; and can include one or more of: geographic delineations (the Toronto local); industrial delineations ("Steelworkers", "Autoworkers"); skill delineations ("Carpenters", "Projectionists"); and so on. Thus, it makes perfect sense for IATSE to say that Local 257 had "jurisdiction" over individuals employed as projectionists in the Ottawa, Brockville and Cornwall area, and that this is a "jurisdiction" that Local 257 has sought to transfer to Local 173 (which currently represents has "jurisdiction" over projectionists in the Toronto, Peterborough, Kingston and Belleville areas following the earlier merger or transfer of "jurisdiction" from the now defunct Local 528). Indeed, this notion of "jurisdiction" even creeps into the collective agreements negotiated by the objecting employers. Thus, in respect of Local 105 a mixed local covering the London and Sarnia area, Famous Players has negotiated a collective agreement which includes the following recognition clause:

The Employer recognizes the Union as the sole and exclusive bargaining agent for motion picture machine operators (hereinafter sometimes referred to as "Projectionists") employed by the Employer within the territorial jurisdiction granted to the Union by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the U.S. and Canada on the effective date of this Agreement.

Similarly, Local 105 and Cineplex Odeon have negotiated a collective agreement with the following recognition clause:

All motion picture, television equipment and other electronic equipment, including the projection of all films of every kind and character regardless of size, in theatres and places, (excluding Telemeter and Television equipment used for advertising purposes of the EMPLOYER, situated in the lobby, entrances and areas adjacent to the theatres and places), in which the EMPLOYER now or hereafter may maintain within the jurisdiction of Local 105, is subject to all terms of this Collective Agreement herewith set forth. All such equipment and other booth equipment requiring operation by a Projectionist shall be manned only by members of this UNION. This shall include all Projectionist of the EMPLOYER, directly or indirectly, where motion pictures are projected or run and shall include any image or sound which is projected by any use of film, screen or otherwise. It is understood and agreed that the EMPLOYER will recognize and employ members of the UNION in Telemeter Operation or similar type of operation.

- 64. The meanings ascribed to the word "jurisdiction" in the *Labour Relations Act* and the IATSE constitution are congruent, and even have some currency in the unions' collective bargaining relationships with the objecting employers.
- 65. In summary, then, all that is necessary to trigger section 63 is a "merger, amalgamation,

or transfer of jurisdiction between trade unions"; and in my view that can include a transfer of geographic jurisdiction or a transfer or jurisdiction over a particular skill group, or both. And because "local unions" are independent statutory actors with their own trade union status, (see the wording of section 84 of the Act), there can be a merger of locals or a transfer of jurisdiction between locals.

- There is no reason to restrict the phrase "transfer of jurisdiction" to situations where "one parent body [has] assigned control over one of its subordinate branches to another parent body", as the Board purported to do in *Hydro-Electric Power Commission*, 57 CLLC \$\frac{1}8,080\$. That may have been a description of what was happening in 1957 when the AFL/CLC and CIO/CCL affiliated unions were digesting the creation of the AFL-CIO and the CLC, and were sorting out their respective organizing territory. But there is no support in the statute for the limited meaning for the phrase "transfer of jurisdiction" enunciated in *HEPC*, there was no authority for it cited at the time, and *HEPC* has not been regularly followed since 1957 (see for example, the discussion *MLS Cable Installations Inc.*, [1987] OLRB Rep. Nov. 1413 which strongly suggests that *HEPC* is simply wrong on this point a proposition with which I agree). In my view, the terms of section 63 are broad enough to encompass a transfer of jurisdiction between local unions in this case from the various named IATSE locals to the applicant, IATSE Local 173.
- 67. I am also satisfied (as the Board was in the case of Kingston Local 528), that "projectionists" constitute a defined craft grouping and an identifiable "jurisdictional" subdivision, capable of transfer between one trade union and another. The question, though, is whether the various geographically defined, but otherwise "mixed", IATSE locals have effectively transferred their "projectionist jurisdiction" to Local 173.

- 68. Under Article 18(13) of the IATSE constitution, affiliated locals have the right to transfer all or part of their *membership* to another affiliated local which is what the various locals have purportedly done here. In each case, the locals have transferred all of their projectionist members to Local 173, which is itself a projectionist local, whose "jurisdiction" was purportedly expanded geographically so that it could accept the transferees. No one disputes that the members affected were to be taken into membership by Local 173, or that Local 173 is willing and able to represent them.
- 69. It is clear that, from the locals' perspective, there was also a complete transfer of "jurisdiction" over individuals employed as projectionists. From the locals' perspective, the transfer of all of their projectionist members and the transfer of "projectionist jurisdiction" were considered to be the same thing. It is equally clear that as a result of this transaction a purported transfer of members and "jurisdiction" over members of that kind Local 173 has assumed control over the employment of projectionists within its expanded geographic area, and the representation of those projectionists when they are employed by various employers. At the same time, the other locals have abandoned their sphere of control over projectionists in their own geographic area (to use the words of Article 26(6) of the union constitution).
- 70. It is also clear from Articles 9 and 10 of the IATSE constitution that the "working jurisdiction" of each local is determinated by its Charter, which, in turn, may be confined to particular classifications or skill groups (including "projectionists") or may be open to "... any person qualified to hold any of the various persons in a theatre which are within the jurisdiction of the International Alliance ...". Here, the mixed locals have purported to remove the projectionist class from their "working jurisdiction" and have transferred them to Local 173, whose territorial and working jurisdiction is thereby expanded (Local 173 is already a "projectionists local").

- I find that this is a "transfer of jurisdiction" both in the sense contemplated by the IATSE constitution, and within the meaning of section 63 of the *Labour Relations Act*: there have been changes in the sphere of control over employment in certain crafts within certain defined geographical areas, and those changes were intended to alter the bargaining agents" "jurisdictions" as that term is used in section 63. The operative document contemplates a "transfer of jurisdiction" and the transferring locals, the receiving local, the parent union, and the members concerned, all thought that that was what was happening. As counsel for the unions points out, it is curious that a stranger to the constitution can suggest otherwise.
- 72. Does it matter that Article 18(13) of the constitution contemplates a transfer of members rather than jurisdiction per se, or that the transferring locals continue in existence. In my view it does not.
- 73. For a craft union organizing particular skill groups, the transfer of all of the projectionists from one local to another, *ipso facto* transferred "jurisdiction" over projectionists to the receiving locals. For a union that organizes on a craft basis, the exercise of craft skills, employment in the craft, and the jurisdiction over the craft, are all intertwined. There is no suggestion that the transferring locals wish to *retain* any power or authority to represent projectionists in their area or to admit them to membership. The evidence is that they do not.
- 74. It seems to me that it is entirely artificial to suggest that a mixed local that has expressly tried to transfer its jurisdiction over projectionists to Local 173 and at the same time has transferred all projectionist members to Local 173 has not also "transferred jurisdiction over projectionists" within the meaning of both the union constitution and section 63 of the Act. Certainly, the members, the local union, and the parent union think that that is what they have done, and they seek statutory confirmation of what flows from it: a declaration under section 63 that, under the Labour Relations Act, Local 173 now has the right and obligation to represent those employee members in accordance with the scheme of rights and obligations that formerly embraced the predecessor local unions.
- 75. I might also reiterate that the process undertaken by the unions in this case is consistent with IATSE's past practice, both in Ontario and elsewhere including an identical transaction some years ago that involved the same employers who now raise objections. Moreover, that earlier re-organization was considered by the Board in a section 63 proceeding in which the objecting employers were both parties; and was then found by the Board to be sufficient to trigger a successorship declaration in favour of Local 173, the present applicant.
- Counsel for the objecting employers submit that the earlier decision was merely a "default judgement"; however, I do not think that that is a complete answer to the union's plea of *res judicata* or *issue estoppel*. The fact is: the objecting employers in this earlier Local 173 application did have an opportunity to raise all of the legal objections that they now wish to assert (see the remarks of Wigram V.C. in *Henderson V. Henderson* 67 E.R. 313, that were adopted by a panel of the Board in *Napev Construction Limited*, [1980] OLRB Rep. June 862).
- 77. At the very least, past practice helps resolve any ambiguity about how things should be done under the IATSE constitution, and helps to determine what the union means by a "transfer of jurisdiction", if the constitution itself does not do so explicitly.
- 78. The construction of the IATSE constitution advanced by the parent and local unions governed by it is certainly a plausible one; moreover, it is an interpretation which is supported by the International President who has the power under Article 7(6) to render an interpretation "binding upon all individual members and affiliated local unions". This decision may not bind the

Board, of course, but in the circumstances, I see no reason to disregard it. As far as the union President and executive board are concerned, there has been an acquisition by Local 173 of the projectionist members and projectionist jurisdiction formerly enjoyed by the various named locals; and no action has been taken under the union constitution or otherwise to question that union decision.

- 79. Moreover, even assuming that the terms of the constitution (in particular Article 18(13)) do not expressly provide for what has purportedly been done here, Article 7(6) empowers the President to "render decisions upon questions of law where the Constitution and By-Laws contain no express provisions for the determination therefore". And it is not disputed that the International President and Executive Board have approved and ratified the proposed transfer of jurisdiction, as has the majority of members in each affected local. If Article 18(13) does not explicitly cover this kind of transaction, it appears to me that the union parties and their officers have adopted and confirmed a process analogous to it; so that in either case, the transfer is valid.
- 80. In all the circumstances, therefore, I find that there has been a merger, amalgamation with Local 173 or a transfer of projectionist jurisdiction to Local 173, and that this re-organization is both sanctioned by the union constitution, and falls within the ambit of section 63 of the *Labour Relations Act*.
- 81. Is there any reason for the Board not to exercise its discretion to make the declaration of "successorship" sought by Local 173? In my view there is not.
- 82. The process undertaken by the various local unions meets the majoritarian concern underlying section 63(2) of the Act. Here, the employees for whom the union exercises bargaining rights are all union members (the collective agreements require it), and those members, in each local union, have voted in favour of the proposed re-organization. No significant number of members challenges the process or result; no union member requests that a representation vote be taken; and, in my view, no representation vote is needed in the circumstances of this case.
- 83. Counsel for the objecting *employers* point out that if Local 173 is declared to be the successor of Local 257 and the various mixed locals, Local 173 will then become the single, exclusive bargaining agent in respect of a number of different bargaining units at the employers' theatres across Ontario. Counsel further points out that once there is a single bargaining agent for these employee groupings, Local 173 will be entitled to apply for a consolidation of bargaining units under section 7 of the Act. Indeed, counsel candidly conceded that this was one of the employers' main concerns, and one of the reasons why they have now raised objections that they did not pursue some years ago: they are concerned that the consolidation of all of the projectionists into one local union, may be the first step towards the goal of a single collective agreement (for each employer) covering all of the projectionists working in theatres across Ontario. The employers do not welcome that prospect.
- 84. There is no doubt that there may be tactical considerations and an industrial relations reality underlying the unions' attempted re-organization, and that there is a relationship between union consolidation, bargaining structure, and bargaining power. Depending upon the setting, a consolidated bargaining structure can strengthen the hand of one party or the other, just as fragmentation may allow one side or the other to pursue a strategy of divide and conquer. But in the circumstances of this case, I do not think that these tactical considerations or the prospect of some future section 7 application militate against the declaration which the applicant seeks. The consolidation of bargaining units is a process that the statute now facilitates, and if the objecting employers have reasons why this should not be done, they can raise them in the context of a section 7 application, if such application is eventually made. As I have already noted, section 63 merely sub-

stitutes Local 173 for its predecessor local unions, without changing any of the parties other statutory rights or obligations; and I am not persuaded that the prospect of some future proceeding under section 7 should influence the granting of a declaration under section 63.

- 85. Having regard to the foregoing and in all of the circumstances, the Board declares that the applicant, IATSE Local 173, has acquired in respect of "projectionists" the rights, privileges and duties of its predecessors IATSE Locals 105, 257, 357, 461, 467, 580, 582 and 634 by reason of a merger, amalgamation or transfer of jurisdiction.
- 86. For the purpose of clarity and pursuant to section 63(3) of the Act, the Board notes that for the purposes of the Act, Local 173 has therefore acquired the rights, privileges and duties of the other locals, whether under a collective agreement or otherwise, and that the employers named in Schedule "A" of the application, Local 173, and the employees concerned, are obliged to recognize that status in all respects.

0513-95-R IWA-Canada, Local 2693, Applicant v. Hill's Greenhouse Ltd., Responding Party v. Louise Myllyaho, Intervenor

Certification - Charges - Intimidation and Coercion - Membership Evidence - Employer operating greenhouse near Thunder Bay - Union applying for certification in May when 13 members of bargaining unit employed - Employer asking Board to defer application and to hold representation vote in November at time when 35 to 40 employees to be employed performing seasonal work - Board satisfied that composition of bargaining unit on application date sufficiently representative - Board dismissing allegations of intimidation and coercion in collection of membership evidence - Certificate issuing

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members Orval R. McGuire and R. R. Montague.

APPEARANCES: Sean Fitzpatrick and Carol Fawcett for the applicant; J. D. Shanks and Herman Van Duyn for the responding party; Peter Hollinger, Louise Myllyaho and Dave Wassenaar for the intervenor.

DECISION OF THE BOARD; July 24, 1995

- 1. This is an application for certification. This decision deals with allegations about collection of the membership evidence by the applicant union (IWA) and the employer's assertion that determination of the application should be deferred until the fall when there will be a larger complement of workers, based on the seasonal nature of the employer's greenhouse business.
- 2. The employer had originally maintained that one employee should be excluded pursuant to the Agricultural Labour Relations Act, 1994, section 2.1 because she was employed in horticulture, as opposed to the rest of the employees who are agreed to be employed in silviculture, to which the Labour Relations Act applies. However, the employer withdrew that objection at the outset of the hearing and thus the parties were agreed on all the issues pertaining to the certification except the two mentioned above.
- 3. The factual basis for the issue about the seasonal nature of the business is largely undis-

puted, and is derived mostly from the evidence of Herman Van Duyn, one of the employer's principals, while the facts concerning the allegations about the collection of membership evidence were the subject of some conflicting evidence. Where necessary we have indicated our resolution of the conflicts in the evidence.

The Seasonal Issue

- 4. The employer's operation is a greenhouse near Thunder Bay where at least 8 million evergreen seedlings a year are grown for reforestation, as well as some poinsettias for Christmas sales.
- 5. The application date was May I at a time when there were 13 members of the bargaining unit. The usual pattern of employment of non-management people is as follows:
 - January 1 or 2 people to prepare the greenhouse for planting which includes for example moving tables around. If repairs are needed more may be called in occasionally.
 - February 10 to 12 people to do an early round of mechanical seeding of trees for a few days of two shifts, as the seeding needs to be done in a concentrated time so that harvest can be at a concentrated time.
 - March 15 people for a week or more of double shifts to do the biggest portion of the seeding.
 - April If necessary anywhere from 4 to 24 people (depending on how good the seed was) are called in to do thinning over the course of a week or two. Then approximately six people do weeding part-time.
 - May Early in May approximately 8 people work for less than two weeks moving the February and March trees outside. Then another 8 people or so do weeding and thinning for less than two weeks.
 - June 26 people are called in to do the second round of seeding for less than two weeks of two shifts.
 - July Up to 15 people may work in July, on finishing up seeding thinning, weeding or maintenance, for up to 10 days but generally it is just a growing month. Also a few clean up the green houses to prepare for August extraction.
 - August About 20 people pull and box seedlings for about one week for one client who does summer planting. The amount of work varies according to the size of the client's planting crew and can vary both in length of time and number of employees called in.
 - September None on silviculture for most of the month unless there is carryover from the August packing, but a about 6 work on poinset-

tias for about 14 days and two work on setting out trees in the latter part of the month for a few days.

October to About 40 people for extracting trees, pulling seedlings and December boxing them for wintering over in a freezer. This lasts 6.5 to 10 weeks, 8 being the most frequent duration. By mid-December, things are wrapped up except for two people to sell poinsettias until Christmas. Then the cycle starts over again in January.

- There are up to 55 people on the call-in list who are called in more or less by seniority, although there is no formal system. The employer tries to give the small amount of work that cuts across most of the months of the year to the most senior people who may work 20 weeks of the year. October to December is the only period of the year where people are employed on a daily basis. There are not many people who only work the harvest; most have some work other times of the year as well. The return rate is quite high; the call-in list has been fairly stable for a number of years. One of the union's witnesses, Ethel Kemp referred in evidence to 13 or 14 people who she thought were generally recognized as permanent part-time.
- Employer Counsel referred to a case involving a summer amusement park Island of Bob-Lo, [1970] OLRB Rep. May 211 and one involving graduate students, Queen's University, [1982] OLRB Rep. May 753 where the Board took into account the seasonal nature of the work, and urged us to do the same.
- The employer argues that the above facts should be dealt with as build-up as there is a real likelihood of an increased workforce in a reasonable period of time which will be more than twice as big as the workforce on the application date. They ask for a vote to be held on November 1, in the middle of the extraction process.
- It is argued that this industry is like canning and tobacco where there is a relatively low labour force most of the year and a dramatic increase in the fall. The Board has referred in some cases to an exception to its general practice of not taking into account seasonal variations for canning and tobacco. Counsel suggests the reason for this is that the workforce is not representative during most of the year as it is part-time, and intermittent. Only at harvest time is there a full complement of employees working full-time.
- By contrast the union argues that many workplaces have variations of a seasonal nature 10. and the Board's practice has been to not take them into account. It is argued that build-up is a concept developed by the Board to deal with new operations or ones that are about to expand an existing operation, and not to deal with seasonal variations. The pattern in the evidence is a regular yearly pattern, not a one-time expansion or build-up. The union's main argument is that the more permanent employees should not have to wait for those with more temporary employment. Counsel refers to Filken Food Services Ltd., [1981] OLRB Rep. Dec. 1771.
- Summarizing the evidence about the number of employees, union counsel says that the operation employs between 5 and 15 workers most of the year, with two weeks in June and August when it goes over 20 and 6 to 8 weeks at harvest time when the number is between 35 and 40. Counsel submits it is a stable workforce for the most part, and the number of employees on the list with the application of the "30-30 rule", 13 employees, is quite representative of the usual workforce. The union sees no reason to deviate from the Board's usual practice, but argues that in the alternative, if the 50% rule from the build-up cases is applied, the only time when thirteen does not represent 50% is harvest time. The union thinks harvest time is not the most representative period

of the year, because it is exceptional in terms of number of employees and number of days of work in a month. May may not be perfect, it is said, but it is more representative than November.

- Counsel argues that to accept the employer's view would be to deprive the more permanent employees of the right to bargain collectively, or at best defer it for months. He distinguishes the cases cited by the employer saying in those cases it was the large number of employees who would be deprived of their right to have their say, while here it is the more permanent employees who would not have their say.
- 13. We have considered this matter in light of the Board's jurisprudence and are not of the view that this is a case for the application of the build-up principle or that it is otherwise premature. This is not a case of a new startup or an expansion. The regular nature of the employment pattern is characterized by intermittent part-time work. However, both employer and union witnesses observed that there is a core of regular people who are apt to get more work over the course of the year. A union witness estimated this group at thirteen without challenge, which is the number of people in the proposed bargaining unit at the time of application.
- 14. If one takes the maximum number of employees employed in each month of the year and averages it out on a monthly basis, the average number of employees is just over 20. We are of the view that bringing an application at a time when there are 13 people in the proposed bargaining unit is sufficiently representative, even if there were a requirement that the bargaining unit be representative of the year round workforce.
- 15. However, there has been no such general requirement articulated in the legislation or the Board's jurisprudence. Unusual fact situations have been dealt with on their merits, such as *Island of Bob-Lo*, a termination application, and *Queens University* which involved an application for a pre-hearing vote in a bargaining unit with high turnover, cited above. But in general, the Board has consistently said it will not take seasonal variations into account. We are of the view that the facts of this case do not compel a different result. The facts in *Island of Bob-Lo* and *Queen's University* are quite different and the Board was not of the view in those cases that the composition of the bargaining unit was representative. By contrast, we are satisfied that there is a sufficiently representative composition as of the date of application.
- 16. We find the remarks of the Board in *Filken Food Services Ltd.*, cited above, germane to this case as well (although we are not here concerned with a student bargaining unit, but one that is analogous in that it is part-time):
 - 4. ... the Board has consistently refused to take into account seasonal fluctuations in the work force, from the point of view of either "build-up" or bargaining-unit configuration, outside of certain historically-recognized industries such as canning and tobacco-harvesting (see *Universal Cooler*, [1967] OLRB Rep. Sept. 546; *Melnor Manufacturing Ltd.*, [1976] OLRB Rep. May 215). [sic] The Board in most instances, in other words, does not take into account the normal ebb and flow of the work force. That is all that is occurring in the present case, albeit for the first time because this is the first year the respondent will be operating on a "seasonal" basis.
 - 5. The present complement of 6 part-time employees is, as the applicant points out in fact representative of the bargaining unit, even with seasonal fluctuation, for approximately 10 months of every year. The Board is not of the view that the desire of a "permanent" complement of part-time employees for collective bargaining (even recognizing that such employees may themselves be "students") ought to be deferred in a case such as this to await the determination of the wishes of additional students employed only during the school vacation period. The Board therefore declines to exercise its discretion under section 7 of *The Labour Relations Act* to defer further processing of the present application.

(It is to be noted that *Melnor Manufacturing* is actually reported at [1969] OLRB Rep. March 1288 and the above noted citation is for *Spramotor Ltd.* [1976] OLRB Rep. May 215).

17. We are of a similar view here. And we are not of the view that the analogy to tobacco and canning, to the extent that those industries are argued to have been an exception to this principle, warrants a different result. We are not, in any event, asked by the employer to do here what the tobacco and canning exception as articulated in *Melnor Manufacturing Limited*, [1969] OLRB Rep. March 1288, would mean. The application of that exception would mean including seasonal workers in a bargaining unit where the application was brought in season and excluding when brought out of season. We are asked not to exclude seasonal workers, but to defer the application.

The allegations about the collection of membership evidence

- 18. The objecting employees allege intimidation and coercion in the collection of membership evidence and urge the Board to find that all of the membership evidence is suspect and ought to be disregarded, or at the very least a confirmatory representation vote should be ordered.
- 19. The first allegation involves David Wassennaar who it is said signed a union card but told the person who collected it not to submit it unless he called. It is said that the card was held in trust pending permission to file it, which was never given, and therefore the card should not be counted. The second involves Mike Hall who it is alleged was told he would get no work unless he signed a card that he would lose his seniority. It was argued that this amounts to a fundamental material misrepresentation about job security and should lead the Board to discount the membership evidence.
- 20. Mr. Wassennaar testified that he was called at home by one of the other employees, Susan Wolframe, on a Sunday night and asked to come over to her house - about a 1/2 mile away from his home. When he arrived, another employee Carol Fawcett, was there who told him they wanted to start a union and asked him if he would be willing to join. They discussed why employees wanted a union and its effect on Mr. Wassennaar. After being there about a half hour, he started to sign. When he made a mistake, the first card was ripped up and he started over. By the time the second card was put in front of him, he was having second thoughts. By his own testimony, Mr. Wassennaar "signed anyway". He received a book and pamphlet to read. When asked by his own counsel whether he said anything, he answered, "I was sort of hoping they would keep it. I said I'd give them them a call back. I said I was a bit weary of signing it." A bit later in his testimony he said that he told her he would give her a call back with his answer about what to do with it. This was varied slightly in further direct examination to "I just said I wanted to get back to her." After he said this Carol nodded, but he did not know if she was answering him or just nodding. When asked what his understanding was, he answered "I was hoping she'd keep it until I phoned her to let her know". He said he did not tell her that in "exact words" but in a sense by saying I'll get back to you with what I want done. He testified that when he left the card was on the table; there is no suggestion that he could not have asked for it back or taken it.
- 21. On cross-examination, Mr. Wassennaar said he had made no statement that night as to why he would be opposed to the union and that neither Ms. Wolframe nor Ms. Fawcett said they would keep the card. Further, he was two houses away from Ms. Wolframe's visiting, later that night, and did not go back to her house to get the card. After thinking about it at home and reading the material, and without consulting anyone else, he says he "sort of made up his mind the union wasn't right". He testified he tried calling Ms. Wolframe twice that night and once or twice

the next morning letting it ring three or four times, but there was no answer. There is no evidence that he tried to call Ms. Fawcett.

- The next day, he stopped in at work to see what was going on in the next couple of weeks, whether there would be loading work for him to do. He did not look for or ask around for Carol or Susan because he did not see their vehicles in the parking lot. He figured they weren't there because they had said they were going into town to send the cards away. It appears that Ms. Wolframe was at work that day. However, he was hoping to get his card back or find out how to do so. He found out later that the cards had already been shipped to Toronto, that they were no longer in Thunder Bay as he had hoped.
- 23. Mike Hall testified that at the end of March or the beginning of April he was approached on a Sunday by Ethel Kemp, Carol Fawcett and Susan Wolframe who came to his house at a time when there were also three other employees of the greenhouse there. They explained that they were trying to get the union in and asked him if he wanted to sign. He says they told him that it would likely benefit him if he signed, and that if he wasn't to sign he could lose his seniority. When asked by his own counsel what Ms. Kemp specifically said to him, he said "I could lose my seniority if I didn't sign, I could have lost my job for all I know I'm not exactly sure". He says she told him that another employee could get ahead of him again, presumably in seniority, which could affect the amount of work he was getting. He was worried about his ability to pay his bills, and the possibility that he would lose his seniority or job. He thought that by signing a card he could stay ahead on the seniority list. When he was asked if he asked Ms. Kemp if he would have more seniority than Dave Wassennaar if the union came in, he said that she wouldn't be able to tell him anyway; because "she's not the boss" and did not know what he had in the way of seniority. He acknowledged on cross-examination that he might not have been paying attention at some points.
- 24. Mr. Hall said it seemed like they were in a bit of a rush and he had to get hold of a friend for them. He provided a telephone number and address so the women could contact another employee about the union.
- 25. Ethel Kemp testified that she spoke within Mike Hall's hearing to another of the employees in the room and told her that they wanted to go for seniority and told her of the reasons why they were seeking a union. According to her account Mr. Hall was quite positive about the idea of a union and offered to help contact others and spoke of his dissatisfaction with what he saw as favouritism. Ms. Kemp says what she said about seniority was that she thought it should go back to when you signed on. She denies saying he would lose his seniority unless he signed and says he did not ask her about this, that he just asked for a card to sign.
- 26. Counsel for the objecting employees maintained that Mr. Wassennaar's evidence showed that he changed his mind before the application date, and his *viva voce* evidence of this fact is the best evidence of the subject, better than documentary evidence. Counsel submits Mr. Wassennaar was pressured by the situation he was presented with, in which he did not know he was going to be discussing the union and he was being told the cards had to go in the next day. Counsel submits that we should find that he indicated he would give a call back if they could use the card, and that the card was held in trust until such a call. Counsel urged us to find that his unsuccessful efforts to contact Ms. Wolframe afterwards were simply consistent with his personality, and not indicative of a lack of interest in contacting her suggested by union counsel. He had not given unequivocal authorization; he had attached a condition and he wanted to withdraw his card. Applying an objective test, counsel argues that the only conclusion a reasonable person could have drawn was that she was not to use it unless he called.

- 27. As for the evidence in regards to Mike Hall he suggested that Ethel Kemp was an evasive witness and his client should be believed in preference to her, and that therefore we should find a material misrepresentation had been made.
- 28. The Board was urged to order a vote by counsel for the objecting employees, either in the exercise of our general discretion to do so, or as a result of the elimination of the two cards from the count. Quoting from Can-Eng Metal Treating Limited, [1988] OLRB Rep. May 444 we were urged to find that a fundamental misrepresentation about a central issue, such as loss of seniority leading to job loss had been made, which should call the membership evidence into question and a vote should be ordered. For the sake of fostering a peaceable atmosphere in the workplace, we were urged to order a vote so that workers who would be at work at other times of the year could express their wishes.
- 29. By contrast, union counsel argued that there is no evidence that the union made any promise to hold the card or give it back, and there is no evidence he asked for it back. And there is no allegation of intimidation or coercion in respect of Mr. Wassennaar. His evidence is really that he hoped they would not use it.
- 30. As to the sequence with Mr. Hall, union counsel asks us to accept Ms. Kemp's evidence and to find that there was no misrepresentation, and at most a misunderstanding. He argued that it was not the Board's practice to disregard membership evidence on the basis of a misunderstanding where there was no material misrepresentation. Quoting *Royal Guard*, [1994] OLRB Rep. Aug. 1057 and *Lutheran Nursing Home*, [1994] Oct. 1362, counsel argued the evidence should be cogent, i.e. forcible and convincing to lead the Board to question the membership evidence.
- 31. We have considered the evidence and argument on this issue, and are of the view that the facts are not of a nature that would cause us to call the membership evidence into question. In *Davis Distributing Limited*, [1994] OLRB Rep. Sept. 1190, the Board recently concisely summarized its approach to such allegations in the following passage:
 - 6. In deciding whether improper conduct by a union organizer casts doubt on the voluntariness of membership evidence, the Board is conscious of the heavy reliance that it places on membership evidence filed by a trade union in certification applications. In order to protect the integrity of a certification process which depends on such evidence, the Board takes care to ensure that where improper conduct is alleged, it is satisfied that it does not cast doubt on the reliability of that evidence: see, for example, *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444.
 - 7. At the same time, the Board is also concerned that it not impose artificial standards of behaviour that are contrary to normal human interaction. The Board has stated that it does not act as a censor of the social pressures which are common to an organizing campaign on the part of those who either support or oppose the union. It would not be a surprise if some employees find the choice a difficult one, if some employees find it harder than others to resist peer pressure from one side or another, or if some employees make a decision which they later regret. It would not be a surprise to find that some statements made during an organizing drive turn out to be wrong, are rude or annoying, or cause distress. The Board assumes that the average employee engaged in a debate about the merits of unionization with other employees has a certain level of ability to make up his or her own mind and to act in accordance with his or her own volition.
 - 8. In order to remain realistic about the social pressures that accompany an organizing drive, the Board has stated that it will treat as qualitatively different improper conduct on the part of union officials and improper conduct by a fellow employee. Further, the Board distinguishes between physical threats and threats to job security, and comments which do not contain those elements either directly or by implication: see *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 and *Dupont of Canada Ltd.*, [1961] OLRB Rep. Jan. 360. The Board has also distinguished between misrepresentations which are not fundamental in that they do not

relate to the effect or purpose of the membership evidence, and those that do: see *Masters Construction Ltd.*, [1988] OLRB Rep. Feb. 162.

9. In this context, the Board ultimately looks to whether the conduct at issue would deter the reasonable employee, in other words, whether the reasonable employee faced with those circumstances would be able to make his or her own decision about union representation.

In our view, whatever Mr. Wassennaar's hopes or understanding were, there was no representation made by the union organizers or any understanding which would make it improper for the union to have submitted the card. His evidence about what was actually said between him and the two employee organizers indicates that he did not clearly communicate to them any condition on the use of the card, which clearly says that he requests and accepts membership in the union. On counsel's point that the *viva voce* evidence should be preferred over the documentary evidence, section 8(6) of the Act allows the Board only to consider change of heart evidence filed in writing on or before the application date.

- As for Mr. Hall, the totality of the evidence, in our view does not establish on a balance of probabilities that Ms. Kemp said that Mr. Hall would lose his seniority if he did not sign for the union. Ms. Kemp had a clear explanation of what she said about seniority and why. Mr. Hall's explanation was less clear, as he explained in his own words that he was not really sure what seniority would mean for him. The assertion that he was somehow intimidated into signing is also somewhat inconsistent with his assisting the organizers, on his own evidence, by supplying phone information, and addresses to help them contact other workers. At worst, on the totality of the evidence we find this to have been a misunderstanding about Ms. Kemp's allusion to the seniority going back to when "you sign on", which she meant to refer to the date of hire, not the date one signed for the union. In any event, and most importantly, Mr. Hall was quite clear that he did not think Ms. Kemp was in a position to know what would happen to his seniority and thus we conclude that he was able to evaluate the statements made by a fellow employee and make up his own mind. In these circumstances, we do not find that a misrepresentation which would cause us to doubt the membership evidence was made by Ms. Kemp.
- 33. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
- 34. Having regard to the findings above and the documentary evidence before it, the Board is satisfied that more than fifty-five percent of the employees of the responding party in the bargaining unit on May 1, 1995, the certification application date, had applied to become members on or before that date. These are not circumstances in which we find it appropriate to exercise our discretion to order a vote.
- 35. Given the parties' agreement on all the other necessary elements to this application, a certificate will issue to the applicant for the following bargaining unit, on which the parties agreed at the hearing:

all employees of Hill's Greenhouses Ltd. in the Municipality of Oliver, save and except manager, supervisors, Office and Sales Staff and persons above the rank of Supervisor.

1562-93-M Canadian Union of Public Employees, Local 3101, Applicant v. **Maison Mère des Soeurs de la Charité D'Ottawa**, Responding Party

Hospital Labour Disputes Arbitration Act - Reference - Board advising Minister that "mother house" operated by order of nuns offering various services to its members, including care for aging members, not a "hospital" within meaning of Hospital Labour Disputes Arbitration Act

BEFORE: K. G. O'Neil, Vice-Chair.

APPEARANCES: Pascale-Sonia Roy for the applicant; Andrè Champagne for the responding party.

DECISION OF THE BOARD; July 13, 1995

1. This is a reference by the Minister under *The Hospital Labour Disputes Arbitration Act*, (HLDAA). The Board has been asked for its advice on the following question:

Is Maison Mère des Soeurs de la Charité d'Ottawa a "hospital" within the meaning of the Hospital Labour Disputes Arbitration Act?

- 2. It is the position of the Canadian Union of Public Employees, Local 3101, (CUPE) that the Maison Mère should be regarded as a hospital under the HLDAA, given the services rendered to the aged population who reside there. By contrast, the employer says that the Maison Mère is not a hospital. Rather, it is the headquarters of an international order of nuns, which among many other activities, cares for its aging members.
- 3. Having considered the evidence before us, and the written and oral submissions of the parties, our advice to the Minister is that the HLDAA does not apply to the Maison Mère, as it is not a hospital or a home for the aged as defined therein, for the reasons that follow.

- 4. To start, a brief summary of the facts, which were not seriously disputed, is in order. The Board heard the evidence of Sister Bibiane de Lavictoire, whose evidence we accept, and the parties were able to agree on certain facts which they stipulated orally as well.
- 5. The Sisters of Charity is an order of nuns which was established in the Ottawa area 150 years ago. It has about 900 members, worldwide, of whom about 700 live in Canada. Its headquarters is the Maison Mère in Ottawa. All of its members have taken religious vows, renouncing their secular lives, in return for which the order commits to provide for them throughout their lives. Neither the Order nor the Maison Mère receives any government funding.
- 6. The Canadian nuns live in community in five separate groups designated as provinces. One of these provinces, La Province du Sacre Coeur, is based at the Maison Mère and is made up of local communities, of up to 30 sisters. Four of these communities are in the Maison Mère and two associated houses are nearby. For the members of the Order, the Maison Mère serves the function of a family home. Many reside there and others return, either for visits or to retire. Eighty rooms are set aside for visitors. For the 133 nuns that live there, it is their residence, where they carry on the activities of daily life. As well, and central to the dispute in this case, there is an infirmary on the third floor, with approximately 45 beds, where the sick and aging members of La Province du Sacre Coeur are cared for. Other residents can call on the services of the infirmary as needed. As much as possible, residents of the infirmary are included in the collective religious life of the Maison Mère.

- 7. Each of the provinces of the order has its own infirmary, usually situated in or near the local residence. The infirmary of one of the provinces external to the Maison Mère is also currently situated there, on the fourth floor, although it has not always been, and it is not clear how long it will be there. Nothing turns on any issue particular to this other infirmary for the purposes of this decision.
- 8. Each of the residents of the Maison Mère who is able takes some part in the Order's work. These activities include teaching, the religious development of its members, and the provision of food, clothing and shelter to them, a hostel for battered women, a centre for the distribution of food and clothing to the poor, a museum, a centre for research, as well as the offices of the campaigns to have Elizabeth Bruyère, the order's founder, and Jean Vanier, the former Governor General, declared saints. The Maison Mère is also the head office for the whole Order and the executive and administrative functions necessary to its ongoing existence are carried out there. Physically it is a large building, housing a chapel seating 600, a meeting room for 500 and rooms for all its functions, which need to be looked after and managed. A separate province of the Order, housed outside the Maison Mère, runs a large public hospital.
- 9. It is a fact of the current demography of many religious orders in North America that the numbers of aging members is not equalled by young entrants. The Maison Mère is not exempt from this trend. The residents of the third floor infirmary are over 65, some in their 90's. The large majority of the other residents could be deemed aged as well.
- 10. CUPE represents a bargaining unit of approximately 33 people most of whom work in the third floor infirmary. Others do maintenance throughout the building. The employees working in the infirmary are nine Registered Practical Nurses, nine health care aides and two maintenance workers. A Registered Nurse who is not in the bargaining unit is on call, as is a medical doctor.
- 11. Sister Lavictoire characterized the care given to the nuns in the infirmary as the ordinary care a family would render, not dissimilar to care that would be given by visiting nurses. There is twenty-four hour care available, which includes the observation of the residents, through regular rounds. The residents of the infirmary suffer from a variety of chronic ailments including alzheimers, heart conditions, depression, cancer and multiple sclerosis, which make it impractical for them to live independently in their own rooms. The range of autonomy is from bedridden to those who can move about only with help. Administration of a wide variety of medication is supervised by the nursing staff. Some seriously ill patients have been transferred to hospital. The evidence is persuasive that there is no significant difference between much of the care given in the infirmary and that given in facilities which have been found to be homes for the aged.

- 12. We turn now to the statute and the submissions. The HLDAA requires that hospital employees and their employers submit disputes over the contents of their collective agreements to arbitrage, rather than resolve them by means of strikes and lock-outs. The legislature has defined a hospital as follows:
 - 1(1) "hospital" means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged; ...

- 1(2) Unless the contrary intention appears, expressions used in this Act have the same meaning as in the Labour Relations Act.
- 1(3) A laundry that is operated exclusively for one or more than one hospital shall be deemed to be a hospital for the purposes of this Act.
- 1(4) A stationary power plant as defined in the *Operating Engineers Act* that is operated principally for one or more than one hospital shall be deemed to be a hospital for the purposes of this Act.
- 13. The current definition includes homes for the aged and nursing homes. When the Act was first introduced in 1965, on the heels of the 1964 Bennett Report, whose focus was recent strike action in large public hospitals, those two categories were not in the definition. They were added to the definition in 1969, removing any doubt as to whether they should be considered as hospitals for the purpose of removing the right to resort to economic sanctions. At the same time, section 1(3) was added to the definition to provide that a central laundry or a heating or power plant operated exclusively for more than one hospital was deemed to be a hospital. The definition was amended again in 1972 to provide that power plants be covered if they operated principally, rather than exclusively, for one or more hospitals.
- 14. The Board's task is to look for the intention of the Legislature in passing the HLDAA as amended, to determine if the facts before us fall within the scope of what the Act was trying to achieve. It is clear that the central focus of the Act is the prevention of disruption of care to people dependent on certain institutions. What is not clear from the statutory definition is the extent of the legislature's reach - exactly how far the legislature meant to go in drafting the somewhat openended definition of "hospital" in the Act. Thus the debate before the Board in this case. What is not controversial is that the physical care given the sisters in the infirmary at the Maison Mère is not different in any significant way from the care given in many facilities which have properly been found to be subject to the HLDAA. (See Dignicare Incorporated, c.o.b. Orleans Community Health Centre (Divisional Court, File No. 462/90, February 12, 1991, unreported, and Select Living (1991) Ltd., [1994] OLRB Rep. Aug. 1082 and Legion Village, decision dated August 30, 1994 which adopt the reasoning in Dignicare in the context of homes for the aged.) It is the nature of the Maison Mère as an institution which is at the centre of the dispute between the parties, rather than any difference over the type of care given. Although it has an undeniably institutional aspect, and the type of care given in the infirmaries is within the scope of the definition, it is not obvious that the Maison Mère is the type of institution which the legislature intended to regulate.
- 15. In giving meaning to the word "institution" in the context of the statutory definition, it is relevant that both the word "institution" in its dictionary sense and the words which follow it in the statute make the purpose of the institution relevant. For example, the most pertinent definition of "institution" in the Oxford English Dictionary is the following:

An establishment, organization or association instituted for the promotion of some object, esp. one of public or general utility religious, charitable, educational, etc.

[emphasis added]

The relevant definition of the French word "etablissement" in the *Le Petit Robert* is not inconsistent:

"Ensemble des installations éstablies pour l'exploitation, le fonctionnement d'une entreprise, et par ext. l'entreprise elle-meme".

In the statutory definition it is an "institution operated for the observation, care or treatment of

persons afflicted" and a "home for the aged" that are included. The Legislature could have easily said that a hospital is an institution in which certain care is provided, or a home where elderly people live, but it did not, and that choice must be given meaning.

- 16. Employer counsel focused on this aspect of the case, arguing that if the "raison d'etre" of the organization is not the provision of care to patients or the provision of a home for the aged, the HLDAA should not apply. Employer counsel submits that the infirmary service is an incidental function to the totality of the functions of the Motherhouse. In his submission, this is very relevant to a finding as to whether this is an institution covered by the HLDAA definition. Referring to the many activities of the Motherhouse, counsel analogizes the role of the infirmary to the percentage of floor space it takes up, about 10%. About one third of the nuns who live in the Motherhouse stay in the infirmary rather than in their own rooms. Counsel poses the question: does the Motherhouse exist for the infirmary? The answer being no, that should be the end of the legal question in his submission. Counsel submits that all the decided cases have a statistical notion within them, whether explicit or not. He refers to *Select Living* (cited above) at para 21, where the finding was that a major component of the service provided was observation, care and treatment.
- 17. Counsel for Maison Mère supports his argument with the decision of the then Minister of Labour in Service Employees Union, Locals, 183/663 and Sisters of St. Joseph of the Diocese of Peterborough, dated June 23, 1992. In this decision a mother house of another order of nuns was found not to be a home for the aged, as indicated in the following excerpt from the decision:

The institution operated by the Sisters of St. Joseph of the Diocese of Peterborough is not a "hospital, sanitarium, sanatorium or nursing home". The issue, therefore, is whether it is some other kind of institution "operated for" the observation, care or treatment of persons who are mentally or physically ill, diseased, injured, convalescent or chronically ill, or alternatively, whether it is a "home for the aged".

With respect to the "other institution" issue, while there are persons resident in the institution who fit the description of being ill and those persons do receive care and treatment and may perhaps be said to be subject to observation, it is clear that this is not the reason for the existence of the institution. The institution is "operated for" the purpose of providing a residence for nuns. While some of the nuns may be infirm, the observation, care and treatment of those nuns is an incidental aspect of the institution's purpose, which is to provide a home for the nuns of the congregation, the majority of whom are not infirm.

A "home for the aged" has historically been interpreted to mean a communal living facility for elderly persons who are in any way dependent on the services provided by the institution, including non-medical services such as meal preparation, personal care and hygiene assistance. However, the institution in the present case does not exist as a communal living facility for elderly persons, it exists as a communal living facility for religious persons, regardless of age.

- 18. Union counsel argues that this is wrongly decided, and should not be followed by the Board.
- 19. Union counsel strenuously opposes using the purpose of the institution as the determining criterion, and proposes instead that the nature of the care be determinative, since otherwise it would be too easy to arrange matters to avoid the operation of the HLDAA. Counsel urges an analysis which starts with the question of whether the medical care furnished to the people in the infirmary would be negatively affected if the services were stopped. If the answer is yes, the union submits that the employees fall under the HLDAA.
- 20. Counsel submits that the services the bargaining unit provides in the infirmary are unquestionably the kind of services to vulnerable people that the legislature had in mind when it prohibited strikes in hospitals, nursing homes and homes for the aged. It is the degree of dependent

dence on the care, and thus the impact of any interruption which is the informing idea, in the union's view. The Maison Mère should be covered for the simple reason that a cessation of care would have a negative effect on the nuns who need the care. Although the total goal of the Maison Mère may not be to care for the aged, the daily reality is that it does care for the aged. In support of this, union counsel relied on cases decided by the Board which have focused on the kind of care given, including *Surex Community Services*, [1994] OLRB Rep. Oct. 1430 and *Select Living* and *Legion Village*, cited above.

- Surex Community Services dealt with an organization providing services to adults with developmental handicaps in residential settings. The level of dependency on the care provided and the nature of the organization lead the Board to find that it was within the HLDAA definition "other institution operated for the care..." It was important to the Board's decision that it found that the dependency of the residents on the care provided was such that their condition would suffer from the cessation of care from their regular care givers in the event of a strike. It is clear from the facts set out in the decision that there was no dispute related to the purpose of the organization, which was the provision of care to developmentally handicapped people, although there was some dispute concerning the issue of deinstitutionalization. Thus, although we agree with that decision, it does not deal with the issue before us which is the relevancy of the purpose of the institution. And it is distinguishable factually because the relationship between the residents and the facility existed because of special needs and the care the facility could provide to meet them, while the relationship between the residents of the infirmary and the Maison Mère was not formed because of the care available in the infirmary, but because of a decision to enter a religious order.
- Counsel for the union says that the St. Joseph's case is inconsistent with *Dignicare Incorporated*, cited above, because it did not follow the court's analysis which is based on an inquiry as to whether the consequences of a strike or lock-out would be negative. The decision in *Dignicare* is a Divisional Court decision reviewing the decision of two different ministers to the effect that Orleans Community Health Centre was not subject to the HLDAA because it did not provide medical observation or treatment. The Court was clear that the definition did not require *medical* treatment in the following passage which represents the rationale for the decision:

The Ministers of Labour erred in law when they determined that an institution must be providing "medical care or treatment to its residents" (July 21st decision), or "care, observation or treatment of a medical mature" to its residents (December 8th decision) in order for the institution to be a "hospital" as defined by the Act.

In light of the use of the words "observation, care or treatment" in the statute, the Ministers erred in determining that an institution would fall within the definition of "hospital" in the Act only if the care, observation or treatment provided by the institution was of a medical nature and only if the institution was similar in nature to a hospital, sanatorium, sanitarium, or nursing home.

Reliance is placed by the Applicant upon the decision of the then Minister, dated December 19, 1986, in *Re Bruce Retirement Villa and Service Employees Union, Local 210*:

"The purpose of the *Hospital Labour Disputes Arbitration Act* is to ensure that persons who are afflicted with physical or mental disabilities are not left without care in the event of a strike or lockout. Elderly residents who require some form of support assistance with the activities of daily living, are exactly the type of persons which the Act seeks to protect."

Further reliance was placed on the decision of the then Minister on October 25, 1984 in Re Versa - Care of Hanover:

"The Act is intended to protect those who may not adequately be able to protect

themselves if services provided by the Lodge were unavailable. If the health and safety of the residents is dependent on services offered by the Lodge, their health and safety could be jeopardized by a strike or lockout. In these circumstances, the HLDAA provides that employees cannot strike or be locked out. Instead, the parties must resolve their disputes by means of binding arbitration."

In our view, in light of the purpose of the Act the observational care provided by an institution to its residents need not be of a medical nature to bring the institution within the definition of "hospital" and within the scope of the Act. We would therefore allow the application.

The decision in the Sisters of St. Joseph's, cited above, does not refer to Dignicare Incorporated, although it was made after it. However, we do not find the two decisions inconsistent. The main thrust of the Dignicare decision is that care does not have to be medical in nature to fall within the HLDAA definition of hospital. The St. Joseph's case is simply based on a different point - that the convent in question did not qualify as the kind of institution covered by the definition.

- 23. Further, there are important differences of fact between this case and *Dignicare*, analogous to our comments above concerning *Surex Community Services*. The institution in question in *Dignicare* was the Orleans Community Care Centre in Ottawa, which the decision notes houses and provides personal care assistance to patients suffering from mental retardation, alcoholism, depression, and psychiatric illness and who are not in a position to provide room and board to themselves. There was no suggestion that the relationship between the centre and its clients had any basis other than the services provided to meet their health needs.
- 24. Further, it is not the Board's view that a finding that there would be some negative effect from the cessation of care is sufficient to resolve the dispute before us, and we do not think *Dignicare* stands for that proposition. Presumably any care undertaken of the elderly or infirm is intended to have a beneficial effect, and thus its cessation would accordingly be negative. But we are not of the view that the Legislature intended for all care given to all elderly or infirm people to attract the coverage of the HLDAA, given the choice of words in the definition. So, although the extent of dependency on the care is a relevant factor in determining the question before us, we do not think that the fact of establishing that the patients in question are in need of care, and thus would be negatively affected by a work stoppage, can entirely answer the question before us.
- 25. The union says that the employer failed to show that alternative measures could be taken to provide care for the sisters. Although it is true that this aspect was not dealt with in detail, neither did the union suggest that there were no alternative measures available. In any event, facts that are in evidence, including that the most serious cases are sometimes transferred to hospital, that many of the nuns at the Maison Mère are not ill and that there are other infirmaries operated by the Order in Ottawa, all warrant the inference that the sisters are not without their resources in this respect. In any event, for the purposes of this decision, we are prepared to assume that the care of the sisters in the infirmary would suffer somewhat if their normal caregivers were on strike, at least for the time it would take to reorganize their care, and this decision should not be taken to suggest otherwise. (Nor should it be taken as any comment on the proper application of the replacement worker provisions in the event of a strike.)
- Regardless of the potential availability of alternative measures we have found above that the kind of care provided in the infirmaries at the Maison Mère is indistinguishable from institutions that have been properly found to be homes for the aged and thus under the HLDAA. But the provision of care is only a minor facet of what the Maison Mère does. We return to the relevancy of this latter fact, on which there was extensive argument before me.
- 27. The union does not dispute that the Motherhouse carries out many activities other than

taking care of the infirm or that it is just those affiliated with the order who receive care there. But the union is firmly of the view that these matters are not relevant to the legal determination that the Board is required to make.

- The union is of the view that to base a decision on the fact that the Maison Mère is not exclusively for the care of the elderly would be to introduce a factor into the definition which is not part of the law. Counsel correctly notes that even within the definition, the legislature was capable of using quantitative notions where it wished, but did not do so in regards to the primary portion of the definition in section 1(1). Section 1(3) provides that the Act applies where a laundry is operated "exclusively for one or more hospital", and that it applies to a stationary power plant operated "principally for one or more than one hospital". In the circumstances, it is argued that it is against all the canons of statutory interpretation to give a quantitative threshold. Counsel proposes an example where a hospital was involved 95% of the time in research, and 5% of its activity was patient care, and argues that the HLDAA would still surely apply.
- There is merit in this submission, and the basis of this decision is not a quantitative one. However, the Board is not persuaded that counsel's point goes as far as argued. The process of determination of how to categorize an institution with more than one function inevitably includes looking at what it does to see how closely it fits the definition. And this will usually have a quantitative as well as a qualitative aspect to it. We are not of the view that looking at the quantitative aspect of the facts amounts to importing criteria into the statutory definition that are not there. The quantitative aspect of activities is often very relevant to a more qualitative question. It may not be determinative, but it is at least a factor to be considered.
- 30. And we have considered union counsel's argument about the fact that the legislature put in the word "exclusively" in dealing with laundries and "principally" in dealing with power plants. In those cases quantitative evidence will not just be evidence of one factor relevant to the question; it will be necessary to the determination. But in my view, it does not detract from the fact that quantitative considerations are not improper when attempting to categorize an institution.
- In a related point, we agree with the union's argument that the nature of the clientele of the institution, i.e. the fact that these are elderly *nuns* does not determine whether or not it is a hospital. By this we mean that the fact that an institution is operated for the housing of a particular category of the aged, as in those who speak a certain language, or those with a particular category of need, would not be determinative of the question of whether or not it is a hospital. But it would be relevant to know if a residence was operated for example, for persons speaking a particular language, regardless of age, while some of them incidentally needed care. And it is relevant to the question before us that the purpose of the Maison Mère in aid of which the infirmary is operated is to house members of their religious order, whether they are aged or not.
- 32. It is also our view that the fact that at this point in history the Maison Mère is a place where the large majority of the residents are properly categorized as aged, does not make it a home for the aged within the meaning of the statute. It is our view that the meaning of "home for the aged" in the statute is a home intended for the aged, i.e. housing the aged in particular, (rather than the young, the disabled, or those who have taken religious vows, for example). It is not a sound basis for statutory interpretation to define a term in a manner that could change according to who happened to be living there, rather than by a change in the nature of the institution. If, of course objects of an institution were drafted as a pretext, to avoid the application of the statute, or facts showed that the stated objects were not actually the ones being pursued, that would be another matter. The Board always considers substance over form. However, that is not the case on the facts before the Board. The stated objects of the Maison Mère are to provide for its members

and to carry on their charitable work. It is not to provide a home for the aged in particular. The objects of the Order do not prevent the operation of a hospital or home for the aged, and the Order does for instance operate a public hospital elsewhere in Ottawa. But the evidence does not establish that the Maison Mère itself is operated for the purpose of providing a home for the aged. It is operated to house its members and to be the home base for their work.

- 33. We have carefully considered union counsel's submission that the Maison Mère is a retirement home according to Sister Lavictoire's evidence and therefore a home for the aged. Although some of the sisters clearly do use the Maison Mère as their retirement home, it is equally clear that many of the residents are not properly considered retired, given the activities described in the evidence. Again, we are not persuaded that the use of some sisters of the Maison Mère as their retirement home or the place they live in their old age is sufficient to render it a home for the aged.
- 34. In a related point, with which the Board agrees, employer counsel underlines that the common denominator for the residents of the Maison Mère is not age, or state of health, but their allegiance to their congregation. The average age of the residents should not be the basis of the legal conclusion about the application of HLDAA, in counsel's submission. Counsel submits that in all the decided cases where the HLDAA has been found to apply, the common denominator of the residents was age or state of health.
- Although it is not determinative by itself, a factor in this decision is that for the individuals who live there, the Maison Mère is a private residence, however it may appear from the outside. We are not of the view that it is likely that the legislature had care in a person's private residence in mind when it passed the HLDAA. The Maison Mère is undoubtedly a private residence, both in the sense that it receives no government funding and that it is entitled to restrict access to its members who consider it their family home. The fact that it is a large, or a collective home, should not render it any less a private residence, in our view. However, to say that the Maison Mère is a private residence is not a sufficient answer to the question before us.
- 36. As union counsel correctly observes, there is nothing in the definition of hospital which excludes private homes explicitly, and the question of public/private in the economic sense is specifically rendered irrelevant by the words in the definition of hospital, "whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain". And thus we agree that whether it is public funds or private ones that pay for care is irrelevant to the matter before us. In any event, although the Maison Mère is a family home, and the Order a family in all but the biological sense to its members, it also has another dimension. Because of the diversity of its activities (social services, museum, research centre, etc.), extent of its organization in the corporate sense and its size, it has an undeniably institutional aspect to its life. For a discussion of this dual nature of a similar institution in another context see *Sisters of St. Joseph of the Diocese of Peterborough*, [1991] OLRB Rep. Dec. 1406, where the Board found that employees of that Motherhouse were not domestics employed in a private home (before a recent amendment to the *Labour Relations Act* which deleted an exclusion for domestics working in a private home).
- 37. Nonetheless, the fact that the members of the order consider the Maison Mère their family home is one factor relevant to its purpose, and thus to how it should be characterized under the HLDAA. Employer counsel argued that the true intention of the legislature was to protect members of the public who leave their private residences because of their health. In his submission, one of the most fundamental points to consider is that these nuns have never left their private

home. Related to this is the point made above, that the reason the sisters live together is not their age or their state of health, but their religious vows.

- 38. We have considered all the above matters, as well as the fact that the norm in Ontario is collective bargaining with the right to strike or lock-out rather than resort to compulsory arbitration. The scheme of compulsory arbitration in the HLDAA is the exception, and as the Board said in *Extendicare Diagnostic Services*, [1982] OLRB Rep. Mar. 371, there is reason to apply it cautiously.
- In sum and on balance, although the Maison Mère provides care in its infirmaries which make the union's argument a credible one, we are not of the view that the Maison Mère is the type of institution the legislature intended to regulate. The Board is persuaded by the evidence and argument that the Maison Mère is not operated *for* the provision of that care and is not a home *for* the aged. The relationship between the patients in the infirmary and the Maison Mère does not exist because of the infirmary services. In all the decided cases, where an institution was found to be a hospital, the reason for the relationship between the client and the institution was the provision of the services of care, treatment, observation, or a home for the aged. Here the relationship between the residents and the institution has to do with mutual commitments made long before the infirmities of age, which are focused on the work of the Order as a whole, not on the services of the infirmary.
- 40. For all the above reasons, we are of the view that the Maison Mère is not a hospital under the HLDAA.

3273-94-R Graphic Communications International Union, Local 500M, Applicant v. Metroland Printing, Publishing & Distributing Ltd., Responding Party

Bargaining Unit - Combination of Bargaining Units - Union seeking to combine separate press and mailroom craft bargaining units of newspaper publisher - Employer submitting that craft bargaining units cannot be combined - Board applying *Windsor Star* case and combining the units - Application granted

BEFORE: Gail Misra, Vice-Chair, and Board Members W. A. Correll and H. Peacock.

APPEARANCES: Melissa Kronick, Norm Beattie and Frank O'Reilly for the applicant; F. G. Hamilton and Brenda Biller for the responding party.

DECISION OF GAIL MISRA, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK; July 27, 1995

1. This is an application for the combination of two bargaining units. The applicant represents a unit composed of the press and photomechanical employees of the responding party at its Wolfdale Road plant. The applicant also represents a separate bargaining unit made up of the mail room employees of the responding party at the Wolfdale Road location. It is these two units the applicant is seeking to combine into one bargaining unit. The responding party opposes the combination application on the basis that the two units are separate craft units having craft collective

agreements, and argues that the *Labour Relations Act* neither permits nor contemplates the combination of bargaining units of different crafts.

- 2. The applicant (the "union") is requesting that the Board combine the two bargaining units pursuant to section 7 of the Act, which states as follows:
 - 7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

• • •

- (3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,
 - (a) would facilitate viable and stable collective bargaining;
 - (b) would reduce fragmentation of bargaining units; or
 - (c) would cause serious labour relations problems.

• • •

- (6) This section does not apply with respect to bargaining units in the construction industry.
- 3. The union submits that combining the two bargaining units will facilitate viable and stable collective bargaining, will reduce fragmentation, and, will cause no serious labour relations problems for the employer. It argues that section 6 of the Act addresses applications for certification and suggests that the factors considered by the Board in such applications are not the same factors which the Board is concerned with in combination applications. The union posits that craft distinctions are no longer relevant in the newspaper industry, and, that the history of mergers of various craft unions to form what is presently the Graphic Communications International Union, Local 500M, indicates that over a period of time there has been a dilution of craft considerations.
- 4. The responding party (the "employer" or "Metroland") argues that by virtue of section 6(3) of the Act the Board cannot combine craft bargaining units. It argues that this section cannot be read out of the Act and that the Board has no discretion to interfere with the mandatory bargaining unit envisaged pursuant to section 6(3). Section 6(3) states as follows:
 - 6.-(3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union practice are commonly associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.
- 5. In addition to its contention that the Labour Relations Act does not permit the combination of craft units, the employer submits that combination of these two bargaining units would not facilitate viable and stable collective bargaining because these units do not share common interests and, indeed, appear to have conflicting interests as manifest by the events of the recent past (outlined in the facts below). It argued there should be no concern about fragmentation since section 6(3) of the Act supports fragmentation along craft lines and since, at the time of certification, the union had wanted, and got, craft bargaining units, it was not now open to the union to

argue for combination of two different craft units. Finally, the employer argued that combination would cause serious labour relations problems because of the difficulty of bargaining a joint collective agreement at the outset, and subsequent collective agreements would take longer to negotiate because of the disparate interests of the two groups. The employer was concerned about the effect combination would have on the employees' already low morale, and on the employees' feelings of insecurity. There was concern that the mail room group, being the smaller group, would have its wishes ignored by the more numerous and craft-oriented employees in the press and photomechanical group.

6. In the course of two days of the hearing, the union called two witnesses and the employer called one witness. Prior to this panel reaching its decision, on May 10, 1995, the Board (panel somewhat differently constituted) released a decision in *The Windsor Star*, (Board File Nos. 2379-94-R and 2380-94-R, May 10, 1995, unreported) [now reported at [1995] OLRB Rep. May 714]. Since that decision addressed some of the issues argued before this panel, the Board circulated the decision to the parties for their comments. Written submissions were made to the Board by both parties. In reaching our decision we have considered all of the evidence led and the oral and written submissions of the parties. The facts relied upon by the majority in reaching its decision are described below.

* * *

- 7. In December 1968 the Lithographers and Photoengravers International Union was successful in organizing and being certified to represent the lithographic offset pressmen (and their apprentices, feeders and helpers) and the photolithographic offset cameramen, platemakers, strippers, and their apprentices, at the predecessor employer to the responding party, Inland Publishing.
- 8. In December 1968 the employees of Metroland's predecessor, Inland Publishing, in the bindery operations, were organized by the International Brotherhood of Bookbinders, Local 28.
- 9. In order to appreciate the union's position that the combination of the two bargaining units in question would not be antithetical to the traditional "craft" orientation of this union, evidence was led to outline the history of the present union. For the purposes of this decision it is unnecessary to recount this history. Suffice it to say the present union owes its existence to the merger of various craft unions and locals. Between 1964 and 1984 there were mergers of lithographers, photoengravers, bookbinders, and printing pressmen, leaving only typographers unrepresented in this industry by the Graphic Communications International Union. Thus, the two bargaining units described above came to be represented by the present applicant.
- 10. There are approximately 38 employees covered by the press and photomechanical collective agreement, and approximately 13 employees covered by the mail room collective agreement. The two bargaining units have not bargained together in the past as the mail room collective agreement expires eight months prior to the press and photomechanical collective agreement. The parties took between five and six months to negotiate a new collective agreement for the mail room in 1994. Negotiations for the renewal of the press and photomechanical agreement have not yet resulted in a settlement, and, the parties are now in conciliation.
- 11. Metroland publishes 28 community newspapers in and around Toronto. It also prints the *eye* for the Toronto market and various flyers. Prior to the existence of Metroland, Metrospan was a company owned by Torstar, and Inland Publishing was a company owned by the Bassett family. In 1981 Torstar bought Inland Publishing and renamed the company Metroland Printing,

Publishing & Distributing Ltd. The bargaining units in question in this application had had collective agreements with Inland Publishing prior to its acquisition by Torstar.

- Newspapers which have their printing done at the Wolfdale Road plant, except for the *Mississauga News*, send flats of the pages to be printed to Wolfdale Road. The photomechanical department then shoot film of the flats, strip the film, and make plates. The plates go to the press room where the press employees put the plates on the press and run the product. The printed papers go by a conveyor up to the mail room where the papers are jogged into bundles, are stacked onto skids, and are prepared to be shipped out by the mail room employees.
- 13. The *Mississauga News* sends film to the plant, rather than sending over flats, and no stripping of that film should be required. Plates are made by the Wolfdale plant photomechanical department and the printing is done as for the other newspapers.
- Between April and August, 1994, during the mail room negotiations, Brenda Biller, the Director of Human Resources for Metroland, asked Norm Beattie, the Vice-President of GCIU Local 500M, if the union was going to combine the two units at Wolfdale Road. She was aware that another union at one of the Metroland newspapers had applied for combination of bargaining units, and that a GCIU local at a Southam operation around Owen Sound had applied for combination of their bargaining units. Beattie told Biller he would get back to her. Biller indicated to Beattie that if the union was not going to apply for combination, the employer may contemplate doing so. Biller thought it may be a good idea because the mail room group was such a small group of employees that they did not like to take the lead position in bargaining concessions when their negotiations preceded the press room negotiations. In the last agreement there were therefore a number of items left contingent on the outcome of the press room negotiations.
- 15. Beattie canvassed the idea with the shop delegates for the two Wolfdale units and asked them to check with their members. He was later told there was no interest in combining the units and he conveyed that message to Biller. It was not until the union was meeting with the press and photomechanical unit in August or September 1994, to set proposals for their negotiations, that a member asked why the union had not negotiated one collective agreement. It then became apparent that at the earlier instance the shop delegates had not asked all of the members for their views on combination. Thereafter, the union began the process of calling a special meeting to discuss combination.
- 16. Since the 1980's the GCIU Local 500M has not applied for units of employees by a single craft, unless that craft was the only remaining group of unorganized employees in a particular workplace. They have tended to organize "all employee" units or "tag end" units wherever possible. These units may include bindery, photomechanical, and other employees. The evidence indicates that other locals of the GCIU were not all following the policy adopted by GCIU Local 500M. Notwithstanding that, the Board accepts that it is GCIU Local 500M's policy to organize broad units wherever possible, rather than continuing to organize by specific crafts. The Board has found that GCIU Local 500M is a trade union within the meaning of the Act, and, since the present application has been made by this trade union, the Board is only interested in what this union's policies are.
- 17. In 1994, to take advantage of the amendments made to the Labour Relations Act allowing for the combination of bargaining units, the GCIU Local 500M decided as a matter of policy to encourage the merger of units wherever there was more than one collective agreement with the same employer. To this end, at some time prior to Sunday, November 27, 1994, GCIU Local 500M sent notices to its members who worked at Metroland Printing, Publishing & Distributing Ltd., at the Wolfdale Road location, to inform them of a special meeting

to be held on that date. Between 15 and 25 members (out of a possible approximately 51 employees) attended the meeting, and the secret ballot vote held indicated that the overwhelming majority of those present at the meeting supported combination of the two bargaining units. The present application for combination of the two bargaining units was subsequently filed.

- 18. There are some similarities between the prevailing collective agreements for the two units. However, the application of the same type of collective agreement provisions may be different because of the way the two units are scheduled for work. As was mentioned earlier, the mail room agreement has some provisions which are contingent on the outcome of the press and photomechanical negotiations.
- 19. While there is some scope in the mail room agreement for mail room employees to move to other departments of the company, no mail room employee has moved into the press room, covered by the press and photomechanical collective agreement, in the last seven years.
- 20. There has never been a strike or lock-out at Metroland. However, the employer maintains that if there was a work-stoppage affecting the press room, managerial staff would be able to run the presses and there would still be work available for the mail room. If a combination is ordered by the Board, both the press and mail rooms would be affected by any work-stoppage.

* * *

- 21. The current mail room collective agreement contains a letter of agreement dated August 5, 1994, indicating that mail room employees may be assigned to assist press crews for some functions. Mail room employees are only to be assigned to those functions if there is no mail room work to be done and if the work is required in the press room because a major make-ready is required, there are late papers, or there is a lack of work. The parties agreed they would review the status of this program after six months and may modify the terms of the letter at that time. If they could not agree on changes, the union would conduct a vote on this issue alone and the vote would determine whether or not the mail room employees would continue to assist the press crews.
- 22. The reason the employer had wished to negotiate the above-noted letter of agreement was that the mail room employees do not have any work to do on Thursday nights and would therefore have had to be laid off for that time. In the two years preceding 1994 Metroland employees had been required to work on a reduced schedule of only two days a week. Although all employees in the mail room were back at work, employee morale was low as a result of the recessionary measures the employer had taken. In an effort to avoid laying off staff once a week the employer therefore wanted to use the down time to train the mail room employees to do some of the clean-up work, to move rolls and put rolls into the press, and in some other press helper functions. Not all of the mail room employees wanted to go and work in the press room, however, this agreement was subsequently ratified, along with the rest of the negotiated collective agreement. One of Metroland's concerns about the current combination application is that if the combination is allowed, the units will be amalgamated and then the press and photomechanical unit employees, who far outnumber the mail room employees, will be in a position to vote down this provision of the agreement which had been reached. As will become apparent, this concern is not without some merit having regard to the attitude of the press employees towards the mail room employees.
- When Metroland sent some mail room employees into the press room for training, as envisaged by the August 5, 1994, letter of agreement, the press and photomechanical bargaining unit objected strongly and filed a policy grievance. The grievance alleged the employer had breached some of the Definitions sections of the press and photomechanical agreement which indicate who can do certain work. The grievance claimed mail room employees could only come to

work in the press room if *no* press department employee was available to do the work in question. It appears the press room employees did not want the mail room employees coming into their area as they were concerned about their own job security. The union claims this was a misunderstanding by the press and photomechanical local which was resolved following a meeting to discuss the grievance, and the grievance was not pursued. However, in negotiations, when the employer proposed including language in the press and photomechanical agreement to facilitate implementation of the letter in the mail room agreement, and, to ensure there would be no more grievances of this type, there was a negative response from the union, and in particular, from the steward responsible for the press employees. There was no evidence to indicate the union made a counter proposal. Subsequently, the employer withdrew the proposal from the table in February 1995.

- Another labour relations problem identified by the employer is the term of the press and photomechanical agreement. It appears since the filing of this combination application the union has taken the position in its negotiations for the new press and photomechanical agreement, that the term of the collective agreement should be such that this agreement, and the mail room agreement, should expire together on April 30, 1996. This would mean the press and photomechanical agreement would run from January 1, 1995 to April 30, 1996, a period of sixteen months. The previous agreements had two year terms. The employer wants a three year agreement to ensure stable and known labour costs in an environment where newsprint costs are increasing.
- Despite Ms. Biller's remark to Mr. Beattie that the employer may contemplate requesting combination of the two bargaining units, the employer no longer supports the idea of combination. The reason for its position is that it believes the press room staff are too nervous about having the mailers working in the press room because the latter's presence would dilute their jobs. The employer's view is based on the press unit's grievance (outlined earlier); on the negotiating position taken by the union in the press and photomechanical negotiations; and, on the employer's perception of animosity between the two units because of the pressmen's pride in their work and their concern about who will work with them. Considering this environment, Metroland is concerned that it will be difficult to bargain a joint collective agreement, and that any efficiencies of bargaining one collective agreement will be lost as a result. In addition, the employer is concerned that in a combined collective agreement it would not be able to get agreement on items like the letter of agreement it negotiated with the mailers in the last round of negotiations because the press and photomechanical group would far outnumber the mailers in a new combined group.
- Metroland took the position that GCIU Local 500M has relied on its traditional and his-26. torical craft rights in the past. It did so in bargaining separate collective agreements. More recently, it fought a long grievance arbitration battle with the employer when Metroland closed its composing room and moved some of that work to the advertising department of the Mississauga News. The union has claimed that the work now being done on computers in the advertising department is part of their craft jurisdiction. No award has issued yet in that case. Metroland also contends that the Board cannot decide this case without considering how the Graphic Communications International Union as a whole has traditionally relied on its craft union status to get bargaining units differentiated by craft designations. Other locals of the GCIU have been applying for craft bargaining units and the employer argues that what GCIU Local 500M has decided is its policy cannot be divorced from what the whole union is doing. Even within the GCIU Local 500M, after the mergers of various craft unions and locals, this local continued to bargain and argue positions based on its craft designations. Thus, the press and photomechanical collective agreement has provisions for preferential hiring, has no probationary period, contains elaborate staffing tables. allows for apprenticeships and training programs, and generally has different scheduling, when compared to the mail room collective agreement.

- 27. The employer's written submissions on *The Windsor Star* decision, cited above, indicate its view that the Board in that case misinterpreted section 6(3). In addition, Metroland argues that the facts in *The Windsor Star* bear no similarity to those before this panel of the Board. It submitted that the Act cannot be used to combine craft and non-craft units.
- 28. The union's submission with respect to *The Windsor Star* decision is that the facts in that case and the one before this panel are not entirely dissimilar and that the facts present here do support combination.

* * *

DECISION

- 29. Having considered the submissions of the parties and the evidence before us, we are satisfied that the two bargaining units should be combined.
- 30. It was argued on behalf of the employer that the Board must read section 6(3) of the Act such that craft bargaining units cannot be combined. On this theory, the union, having relied on its craft status in the conduct of its relations with the employer, cannot now seek combination and ask the Board to ignore the craft designation of these two bargaining units. The union argued there was nothing in section 7 to limit the Board's ability to combine craft units. Further, it argued that section 6 addresses considerations pertinent to certification applications, and that those criteria are different from what the Board considers in combination applications.
- 31. The combination of craft bargaining units and non-craft bargaining units has been considered recently by the Board in *The Windsor Star*, (Board File Nos. 2379-94-R and 2380-94-R, May 10, 1995, unreported) [now reported at [1995] OLRB Rep. May 714]. In that case, the Board was asked to combine a maintenance unit, a truck driver unit, and a craft unit composed of journeymen pressmen at a newspaper. The employer argued that the craft unit could only be combined with a like craft unit and that the mandatory language of section 6(3) deemed that the units in question were not capable of being combined. The argument made by the employer in *The Windsor Star* case appears to be very similar to the argument made in the case before this panel.
- 32. In addressing this argument the Board, which ultimately found that combination of the three bargaining units was appropriate in *The Windsor Star*, stated as follows:
 - 16. We commence with an analysis of those sections. Section 6(3) is part of section 6, which is applicable in certification applications, and describes the Board's task of choosing the basic building block of collective bargaining, the bargaining unit. There has been special provision for craft units since the inception of provincial legislation in this area. See section 5(4) of the Wartime Labour Regulations under the Labour Relations Board Act, 1944. This provision and its successors give recognition to the historical status and claims of the practitioners of certain crafts. The Board is required by section 6(3) to deem appropriate for collective bargaining a unit which meets the section's definition, if the application for certification is made by a trade union pertaining to the skills or craft at issue. However, it is not required to apply it on a displacement application, where the craft employees are already in a bargaining unit represented by another bargaining agent. The threshold set by the section is quite specific and has a number of prerequisites: 1) a group who exercises technical skills or who are members of a craft; 2) by reason of which they are distinguishable from the other employees; 3) who commonly bargain separately and apart from other employees; 4) through a trade union that according to established trade union practice pertains to such skills or craft. Both the group and the union applying have to be identifiably linked to the craft. Section 6 was changed by the Bill 40 amendments, particularly with respect to full-time, part-time and professional bargaining units, but section 6(3) was left untouched.

- 17. Section 7 on the other hand, is new to the Act as of January, 1993. It gives the Board the discretion to combine bargaining units, either at the time of certification or later, where each of the bargaining units is represented by the same trade union. The Board is entitled to take into account whatever factors it considers appropriate, but the factors considered must include the extent to which combining the bargaining units, would (a) facilitate viable and stable collective bargaining; (b) reduce fragmentation of bargaining units; or (c) cause serious labour relations problems.
- 18. Although the Legislature has not been explicit about how sections 6 and section 7 work together as to the definition of bargaining units, the basics can be ascertained from the choices made in what was and what was not changed in 1993. The Legislature can be taken to have been aware that craft units create fragmentation in many bargaining unit structures. Yet section 6(3) was left unchanged. Others of the amendments, including section 7, specifically endorse and mandate reduction in fragmentation. And the statute ought to be interpreted as a harmonious whole. The Legislature has thus underlined the overall value in the reduction of fragmentation. but has left the craft union's right to apply for and have deemed appropriate a traditional craft unit at the point of certification. However, section 7 represents another point at which the Board may look at bargaining unit structure, and the status of a craft unit was not listed as one of the mandatory considerations in this second look. Nor is there any mandatory prohibition concerning craft units, or any specific negative direction as in section 7(4), where the Board is told specifically not to combine geographically separate manufacturing bargaining units in certain circumstances. Nonetheless, the Legislature provided that the section not apply in the construction industry, where the provisions for province-wide bargaining are almost entirely based on a craft union structure.
- 19. We agree with employer counsel that Bill 40 did not water down section 6(3) or make section 7 supreme and that section 6(3) is obligatory while section 7 is discretionary. However, we do not agree that it follows that the Board is not allowed to combine craft and non-craft units.
- 20. While a craft unit is mandatory under the conditions outlined in section 6(3), we are of the view that fundamental to that section is that it is at the point of certification. And it is structured differently than section 6(6) which indicates certain units of guards should remain separate to avoid conflict of interest. (See *The Municipality of Metropolitan Toronto*, [1995] OLRB Rep. Feb. 150). We are not of the view that there is any competition between the mandatory nature of section 6(3) and the discretionary nature of section 7. The two sections can be read in a harmonious manner, giving both their full weight. This can be done by treating the historical status of craft units, as expressed in section 6(3) of the Act, and preserved in the Bill 40 amendments, as one of the things that the Board may take into account in exercising its discretion under section 7 either in general, or as part of the consideration of potential serious labour relations problems. In sum, we are persuaded that there is no bar to combining a craft unit with another unit expressed either in section 6 or section 7.
- 21. Thus, in our view it is appropriate to consider this application on its merits in light of the statutory criteria for combination applications.
- 33. We agree with the reasoning of the Board in *The Windsor Star*, cited above, with respect to this issue and do not agree with the Metroland submission that the Board in *The Windsor Star* misinterpreted the statute. Although the panel in that case was being asked to combine a craft unit with non-craft units, and we are being asked to combine two craft units, we are of the view that the reasoning is the same. Section 6(3) clearly operates at the point of certification, however, the legislature did not include craft status as one of the list of matters which the Board is obliged to consider when dealing with section 7 applications. Nor did the legislature indicate in any way that the combination provision should not have application to craft units, as it did for bargaining units in the construction industry. While the craft status of the two units in question before this panel is one of the things which we may take into account in exercising our discretion under section 7, we find there is no bar to a combination of two or more craft units, either to each other, or to other non-craft units.

- 34. In reaching our decision we have given consideration to the factors outlined in section 7(3). We are of the view that combination of these two bargaining units would facilitate viable and stable collective bargaining. These parties already have a history of bargaining amicably and there have been no strikes or lock-outs that the parties were aware of in the last 25 years. Nonetheless, having only one collective agreement will mean there will be only one opportunity for a work stoppage to occur, rather than the current situation of having two periods when work stoppage would be legal.
- We are cognizant of the evidence of recent tension between the mail room unit and the press and photomechanical unit regarding the use of mail room personnel in the press room. The majority is of the view that this tension will likely be reduced by an order combining the two units and that combining the units will assist in lowering the artificial barriers between these two units, barriers which may have contributed to the tension between the units. Combination will be of assistance to the applicant to the extent that it will allow the union to present a unified bargaining proposal for both the units. Combination will also facilitate collective bargaining as it will eliminate the need to conduct two separate rounds of bargaining, and, it will reduce any possibilities of work jurisdiction grievances.
- 36. We note that within the last year the employer, through Ms. Biller, had raised the possibility of the employer applying for combination of these two units. Ms. Biller had noted that the small group of mail room employees appeared not to like to have to take the lead in bargaining even though their collective agreement expired before the press and photomechanical unit's agreement. As a result, even after their bargaining was complete, some items remained outstanding pending the outcome of the second group's negotiations. Combination of these units would eliminate this problem which results from the fact that 13 employees in the smaller unit do not feel they can bargain effectively the terms which will have an impact on the larger group of 38 employees. Thus, through this combination, the fragmentation of this workforce will be reduced.
- 37. It was argued on behalf of the employer that the present negotiations between the employer and the press and photomechanical unit have bogged down on the issue of the term of the collective agreement. We cannot see how problems in those negotiations can be characterized as serious labour relations problems which the Board should consider in determining whether a combination application should be allowed.
- 38. A combination order will eliminate the duplication of effort and costs associated with separate collective bargaining for the two units. Although it may initially take some time to meld the two collective agreements, since the parties are presently in negotiations for the press and photomechanical agreement, it will make it easier to work on only one set of negotiations. Stability will be favoured by the parties having to administer only one collective agreement, rather than the present two.
- While the majority notes the concern the employer has exhibited for the morale of its employees, we are bound to weigh the evidence and the legislated considerations in reaching our decision on whether or not combination of the two bargaining units is appropriate. The evidence before us suggests that the union consulted with both bargaining units prior to making this application, and it received support for the idea of combination. It is the trade union which is the bargaining agent for all of these employees, and as such, it represents their interests. There were no employees from either of the bargaining units who requested of the Board that they be permitted to participate in these proceedings, and no employee testified before the Board with respect to any matter. In *The North Bay Nugget*, [1994] OLRB Rep. Aug. 1137, a combination application case in the newspaper industry, the Board heard evidence of similar tensions between the production

department and the advertising department at that newspaper. The Board, in granting that combination, noted at paragraph 69 of the decision that it believed tensions between these two units would be reduced by a combination of the two units as artificial barriers between the units would be eliminated. In *The Hydro Electric Commission of the City of Ottawa*, [1994] OLRB Rep. April 516, tensions between two bargaining units were noted, but the Board was of the view that a combination would reduce the barriers between the units, barriers which had contributed to animosity between the units. We are in agreement with these decisions and, for the reasons articulated in the decisions cited above, are also of the view that combination in this case will facilitate better relations between the two bargaining units.

- 40. One of the labour relations problems identified by the employer was the difficulty which would be encountered in trying to meld the press and photomechanical craft language with the language of the mail room agreement. This was also an issue of concern to the employer in *The Windsor Star* case, cited above. We are of the view that the parties will be able to effectively address any such issues during negotiations. Having a diversity of employment interests is not an impediment to a combination application, (see *Mississauga Hydro-Electric Commission*, cited above, and *The North Bay Nugget*, cited above). As the Board noted in *The Windsor Star*, cited above, at paragraph 33, harmonizing the two collective agreements may require some creativity, but the potential for problems in fashioning a work jurisdiction clause does not amount to a serious labour relations problem.
- 41. It was argued before us that since GCIU 500M has relied on its traditional and historical craft rights in the past, it should not be permitted to combine its two craft units at this juncture. The evidence disclosed that the craft unions in the printing industry have been merging and amalgamating in the last thirty years to the point where there are very few "craft" unions left. The GCIU 500M has itself had a policy of seeking broader bargaining units wherever possible, and since the amendments to the *Labour Relations Act* in 1993, has been seeking to combine its bargaining units wherever possible.
- 42. The Board in *The Windsor Star*, cited above, addressed this issue as follows:
 - 35. ... Is the historical place of craft units in this industry, and/or under section 6(3) reason to refuse the order even if we are not obliged to refuse it? We think not. The Board had occasion to comment on the disadvantageous effects of craft based bargaining unit as early as 1946, when the then Chair of the Board, Jacob Finkelman, remarked on the atomization created by new craft units in *The Steel Company of Canada*, [1946] OLRB Rep., decision dated March 26, 1946. When confronted with a choice between craft-like fragmentation when not mandated by section 6(3) or the construction industry provisions, and in the absence of exceptional circumstances or the agreement of the parties, the Board has favoured broader based bargaining units. Whether in education, printing or elsewhere, departmental and classification based units have generally not been found to be appropriate. For some of the most oft-quoted decisions on this subject, see *Kidd Creek Mines*, [1986] OLRB Rep. 736, *TV Guide*, [1986] OLRB Rep. Oct. 1451, *Hamilton Spectator*, [1986] OLRB Rep. Aug. 1177, *Toronto Board of Education*, [1970] OLRB Rep. July 430 and more recently, *The Board of Governors of The Salvation Army*, cited above.
 - 36. The newspaper industry was organized in a notoriously fragmented fashion. As the Board's jurisprudence shows, craft units were granted where the conditions of section 6(3) were met, as in *Inland Publishing Co. Limited*, [1968] OLRB Rep. Dec. 910 or where the historical practice of non-craft bargaining units was persuasive as to appropriateness under section 6(1). See for instance *Hamilton Spectator*, cited above. But as technological change blurred craft lines, organizing patterns changed somewhat, and the Board has sought to reduce the fragmentation in the industry where it has the opportunity. There is simply nothing before us that we find warrants stopping that trend at the border of section 7, particularly where the beneficiary of the special status, a craft union, is itself seeking combination with non-craft units.

We respectfully agree with the analysis cited above.

43. Having considered all of the evidence and the submissions of the parties, we are of the view that a combination order would facilitate viable and stable collective bargaining, would reduce fragmentation of bargaining units, and would not cause serious labour relations problems. For all of the above reasons, the two bargaining units are combined into one unit. We remain seized with regard to any further remedial relief.

DECISION OF BOARD MEMBER W. A. CORRELL; July 27, 1995

- 1. I do not agree with the majority decision in this case for the following reasons.
- 2. I support the concepts that this local union 500M of the Graphic Communications International has enjoyed certain rights and privileges as a craft union. These rights and privileges were granted to them as a condition of their certification as a "craft" union.
- 3. These rights include control of membership in terms of the craft definition, preferential hiring rights, staffing schedules, apprenticeship and training programs. These and other rights and privileges are part of the bargaining unit definition which is the basic building block of the certification and the bargaining rights thereby granted to the certified union. This union now says thank you for that but times have changed and we want the rules to again be realigned in our favour. Not necessarily, it should be noted, in favour of the employees involved but in favour of the applicant union.
- 4. Notice must also be taken that the Board in its majority decision is listening to Local 500M of this International union. What other new ideas or even status quo positions are to come forward from the International or its other local unions, only the future will tell.
- 5. Despite certain facts, the majority decision assumes that the combination of the two units will not result in serious labour relations problems and will facilitate viable and stable collective bargaining.
- 6. The facts are that there have been no serious labour relations problems to date and there has been a history of viable and stable collective bargaining. The old and ungrammatical adage states "if it ain't broke don't fix it".
- 7. While these facts are evident it was also found in the presentations to this Board that there is concern by the craft unit of the intrusion in to their workplace rights by mailroom employees. There occurs then concern of job security. Workplace stability is not likely to be enhanced by combining units of workers who have such concerns. This concern is noted in paragraph 22 of the majority decision.
- 8. A grievance by the applicant craft unit underlined these concerns and although later it was the subject of negotiations, it was not in the final analysis fully resolved.
- 9. It would certainly appear that the smaller unit of mailers will lose a good deal of their bargaining clout to the craft unit. The craft unit employees have exhibited their concerns about job security and a diminishment of their craft pride. These factors combined with the animosities between the two units now emerging will not contribute to stability in collective bargaining or ensure that serious labour relations problems will not emerge.
- 10. The observations in paragraphs 35 to 40 of the majority decision concerning the manner

in which these difficulties will be avoided are simply naive conjecture. As a Board we cannot make such assumptions based purely on such logic.

11. Paragraph 34 of the majority decision states:

"These parties already have a history of bargaining amicably and there have been no strikes or lock-outs ... in the last 25 years."

I simply repeat my earlier comment: "if it ain't broke don't fix it". There needs to be a substantial justification for change and I have yet to hear it.

12. In my opinion the units should not be combined.

1255-95-M Sheet Metal Workers' International Association, Local 537, Applicant v. **Niagara Mechanical Contractors,** Leslie Brothers Inc., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666, Responding Parties

Construction Industry - Interim Relief - Jurisdictional Dispute - Remedies - Sheet Metal Workers' union and Plumbers' union disputing assignment of certain work involving installation of fan-powered boxes - Sheet Metal Workers seeking interim order restoring original assignment of disputed work - Application for interim order dismissed

BEFORE: *Inge M. Stamp*, Vice-Chair.

APPEARANCES: J. Raso, Owen Pettipas and Fred Kneebone for the applicant; Robert Silberstein and Phil Wiseman for Niagara Mechanical Contractors; Larry Myers for Leslie Brothers Inc.; A. J. Ahee and Edward Nicholas for United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666.

DECISION OF THE BOARD; July 13, 1995

- 1. By decision dated June 29, 1995 the Board dismissed this Application for Interim Order under section 92.1 of the Act with reasons to follow. Herewith are the reasons for dismissing this application.
- 2. This is an application pursuant to section 92.1 of the *Labour Relations Act* in conjunction with an Application Concerning Work Assignment. For ease of reference I will refer to the parties as Sheet Metal Local 537 or Sheet Metal, U.A. Local 666 or U.A., Niagara Mechanical and Leslie Brothers. Section 92.1 provides:
 - **92.1**-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.
- 3. In its application Sheet Metal Local 537 is asking for an interim order stating:

The Applicant requests an Order restoring the original assignment of the installation of fan-

powered boxes at the Ministry of Transportation Project, St. Catharines, Ontario, to members of the Sheet Metal Workers' International Association, Local 537.

- 4. The parties submitted comprehensive written materials in support of their positions and made submissions at the hearing.
- 5. Niagara Mechanical subcontracted the work giving rise to the jurisdictional dispute to Leslie Brothers. This work involves the installation of fan-powered boxes. Niagara Mechanical is bound to the U.A. collective agreement and does not have a collective agreement with the Sheet Metal Workers Union. Leslie Brothers is bound to the Sheet Metal agreement but does not have an agreement with the U.A.
- 6. Leslie Brothers had installed this type of equipment previously for Niagara Mechanical in other areas of Ontario. This is the first job done in the St. Catharines area by Niagara Mechanical. The work started last December 1994 at the Ministry of Transportation in St. Catharines. 350 boxes or units out of a total of 472 have been installed by Leslie Brothers using sheet metal workers. This represents approximately 70% of the boxes.
- 7. Sometime in April 1995 the installation of suspended air conditioning units were being performed on the same jobsite by members of the U.A. The U.A. and Sheet Metal representatives agreed this work should be performed by a composite crew and this was implemented.
- 8. It is the applicant's assertion that members of U.A. Local 666 were unhappy with this result and in retaliation claimed the installation of the fan-powered boxes on a composite crew basis with the sheet metal workers. Reference was made to the Interim National Agreement between the U.A. and the Sheet Metal Workers dated August 31, 1956. It is U.A. Local 666's position that pursuant to this agreement these units should be installed with a composite crew. The Sheet Metal take the position it is exclusively their work and as they have already performed 70% of this work it should not be taken away from their members at this point.
- 9. As the parties were not able to resolve their dispute for a variety of reasons which are not relevant to my determination, Niagara Mechanical withdrew its contract from Leslie Brothers. Niagara Mechanical is bound to the U.A. collective agreement which has a subcontract clause requiring it to subcontract all U.A. work to subcontractors signatory to the U.A. agreement.
- Sheet Metal Local 537 submits it has met the tests articulated in the Board's jurisprudence with respect to section 92.1. There is an arguable case in the section 93 application. Sheet Metal Local 537 submits that under the Rules of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan) when a jurisdictional dispute exists the original assignment must be maintained until the dispute is adjudicated. The original assignment was to its members. Niagara Mechanical knew that Leslie Brothers uses Sheet Metal and that is the assignment that should be preserved. The Sheet Metal did 70% of that work and they should be allowed to continue. The U.A. should not be permitted to pressure the contractor to withdraw this work from the Sheet Metal and Leslie Brothers. It is the applicant's contention that the U.A. was aware of how 70% of this work had been performed and cannot now demand a change in assignment.
- There were submissions from both unions as to their lack of success in having this matter resolved by their own representatives, Niagara Mechanical and Leslie Brothers. For the purpose of this decision it is irrelevant who, if anyone, was responsible for the lack of success in getting the appropriate representatives to meet in order to resolve this issue.
- 12. One or two additional units were installed under a subcontract from Niagara Mechani-

cal to Lincoln Mechanical, a company signatory to both the U.A. and the Sheet Metal agreement. Lincoln Mechanical performed the work with a composite crew of two sheet metal workers and one pipefitter.

- 13. On June 1, 1995 Niagara Mechanical asked Leslie Brothers to put the installation of fan-powered boxes on hold until the problem could be resolved.
- The harm asserted by the Sheet Metal union is that they do not have an agreement with the Mechanical Contractor who subcontracted the work. There was an original subcontract by a U.A. company to a Sheet Metal company with no objection by the U.A in May. Sheet Metal Local 537 submits they do not have the same power and are at the mercy of the mechanical contractor. The applicant asserts there are legal mechanisms for dealing with work assignment disputes and on-the-job pressures and tactics should not be allowed.
- 15. The applicant submits there is no harm to the U.A. as they would be in the same position as they were in the beginning, they did not ask for the work earlier. There is no harm to maintaining the status quo and there is no harm to Niagara Mechanical. There is harm to Leslie Brothers. The applicant requests the status quo be maintained and this work be done by sheet metal workers, either directly or by a subcontractor signatory to the Sheet Metal agreement.
- 16. Counsel for the U.A. submits the applicant does not have an arguable case. The jurisdictional dispute complaint is not yet perfected. The international representatives have yet to meet according to the Rules of the Plan to attempt to resolve this issue. The U.A. asserts there was no mark-up with respect to this work. Lincoln Mechanical, who is signatory to both collective agreements, did some of this work using a composite crew. The U.A. urges the Board to draw some conclusion from that with respect to the appropriate assignment. Counsel submits the practice of single trade employers is of little use when determining the merits but rather the Board should look at contractors who are bound to both agreements.
- 17. The harm to the U.A. would involve rewriting its subcontract clause. Niagara Mechanical would be exposed to a section 126 grievance alleging breach of its subcontract clause. Counsel asks the Board to decide that Niagara Mechanical sublet the work as it sees fit in accordance with its collective agreement obligations.
- 18. Niagara Mechanical submits this is a dispute between two unions both of which are doing their best to manipulate the process to suit their needs. While Niagara Mechanical has a history of subcontracting the installation of this type of equipment to Leslie who uses sheet metal workers this is the first installation in the St. Catharines area. This particular type of product has been on the market for about six years and these units appear to be the first ones installed in this area.
- 19. Niagara Mechanical asserts it was faced on the one hand with a practice of subcontracting to Leslie Brothers and on the other hand with the U.A. filing a grievance. If the interim order is granted there is harm to Niagara Mechanical. The U.A. could seek damages from Niagara Mechanical.
- 20. Niagara Mechanical made it clear if this dispute was not resolved it would be forced to delete the work from Leslie Brothers because it was faced with a grievance from the U.A. It is the company's view based on the 1956 agreement between the U.A. and Sheet Metal that this work should be performed by a composite crew. Niagara Mechanical would prefer to have the international representatives get together and make a decision but both unions seemed reluctant to do this on an informal basis.

- 21. Counsel for Niagara Mechanical submits the Board does not have jurisdiction to grant the interim order because Niagara Mechanical is contractually entitled to delete this work from Leslie. But if the Board finds it has jurisdiction the interim order should be for this work to be done by a composite crew pending final resolution. There is irreparable harm to Niagara if U.A. grieves and is awarded damages.
- 22. Leslie Brothers state they have always installed these units with sheet metal workers. This is the first such unit installed in the Niagara Region. Leslie is bound to the Sheet Metal's collective agreement only.
- 23. Counsel for the Sheet Metal asserts the applicant was following the process in a jurisdictional dispute as required under article 2.2 of the Plan.

Decision

- 24. This is a request for interim relief in the context of a work assignment complaint. Paragraph 17 to 21 of *Tembec Forest Products (1990) Inc.*, [1995] OLRB Rep. Jan. 66 make the following comments with respect to an application for interim order in context of a jurisdictional dispute:
 - 17. The second alternative, interim order requested is that the Board order the assignment of the work in dispute in the section 93 application to the members of the Carpenters. We begin our consideration of this with the comment that the nature of a typical work assignment dispute is quite different from most other conflicts which come before the Board. Where one side wins by "gaining" some work, the other side correspondingly loses the same work. It is difficult to see how the harm or prejudice that one side suffers by not having the work until the merits of a section 93 application are determined, outweighs the harm or prejudice to the other side if the work were re-assigned by the Board on an interim basis.
 - 18. In this case, the applicant relied on the Board's decision in Sayers & Associates Limited, Board File No. 0068-91-G decision dated August 29, 1994, unreported, to say that there is a possibility that even if it eventually succeeds on the section 93 application, its members may never recover the financial loss they have suffered by wrongfully being deprived of the work in the interim. However, it acknowledges that the same would hold true for the members of the IWA if the Board were to grant the interim relief requested and order a re-assignment of the work from members of the IWA to members of the Carpenters.
 - 19. The applicant does not ultimately characterize its submissions as going to a "balance of harm" test. Rather, the applicant asserts that in a context of a disputed work assignment, the Board's task in an application for interim relief should be to maintain the "status quo" pending the hearing of the merits. In this case, the status quo is that the parties have generally understood the Carpenters' bargaining rights to extend to the planing operations of the employer, and the IWA bargaining rights to extend to the sawmill operations. It would be in keeping with the status quo for the Board to order that all planing operations at the Dimension Plant will be performed by members of the Carpenters on an interim basis.
 - 20. The other parties agree with the general proposition that the Board ought to look to the status quo (although, as indicated above, the employer takes issue with the Board's application of section 92.1 to a work assignment dispute). However, they vigorously disagree with the applicant about what the status quo entails.
 - 21. We do not find that appeals to the status quo assist the applicant in this case. First, in this particular context, the manner in which each union characterizes the status quo cannot be separated from its view on the merits of the section 93 application, for their references to the status quo are based on their views of their historical claims to the work in question. For the Board as well, this is a reason why this concept has limited utility in the present circumstances, since those are precisely the types of issues that will be determined in the main application. Second, the Board's references in decisions on interim relief to preserving the status quo are based on broader labour relations concerns. The status quo does not have independent value in itself.

The Board may intervene to preserve a status quo because in doing so, it protects the exercise of rights under the Act, or provides labour relations stability. In the case before us, it is not clear that intervening on an interim basis will further those goals any more than not intervening. Indeed, it may very well be that the nature of many work assignment disputes is such that they are unlikely to give rise to the sorts of problems which the Board has sought to address in those cases where it has provided interim relief under section 92.1.

- 25. In dismissing this application I adopt the reasoning of the Board in the *Tembec Forest Products* (1990) *Inc.*, *supra*. In that case the company was bound to both collective agreements and the direct employer of the employees involved in the disputed work assignment.
- 26. In the case before the Board restoring the "status quo" would involve directing Niagara Mechanical to subcontract work to a contractor bound to a collective agreement with the Sheet Metal Union only which would arguable put Niagara Mechanical in a position where it would appear to be violating its subcontract provision with the U.A. Each of these contractors is bound to only one of the collective agreements. Assuming, without finding that the Board has jurisdiction to issue an interim order where the applicant does not have a collective agreement with Niagara Mechanical, for the reasons given in *Tembec Forest Products* (1990) *Inc.*, supra, where both unions had a collective agreement, the Board is not prepared to grant the interim order.
- 27. The Board notes that Niagara Mechanical attempted to get the two unions to get together to resolve this issue. It is to the detriment of all the parties that they were not able to get the appropriate representatives together to resolve this issue. Niagara Mechanical has subcontracted one or two of these units to Lincoln Mechanical who performed the work with a composite crew of two sheet metal workers and one pipefitter. Lincoln Mechanical who is subject to pressures from both unions, as it is signatory to both collective agreements, performed the work on a composite crew basis. Even if the Board had been inclined to make an order directing Niagara Mechanical to subcontract to a sheet metal subcontractor such an order would not stipulate a sheet metal only subcontractor.
- 28. It is not clear what remedy is available where a union does not have a collective agreement with a particular contractor. The "harm" of not having a collective agreement with a mechanical contractor asserted by the applicant, is not the kind of harm that can be remedied by an interim order under section 92.1. For all of the above reasons the application for interim relief was dismissed.

3756-93-M Service Employees International Union, Local 204, the Union v. North Yorkers for Disabled Persons Inc., the Employer

Hospital Labour Disputes Arbitration Act - Reference - Board advising Minister that group home providing attendant care to physically disabled adults a "hospital" within meaning of Hospital Labour Disputes Arbitration Act

BEFORE: Pamela Chapman, Vice-Chair, and Board Members S. C. Laing and Pauline R. Seville.

APPEARANCES: Jeffrey Sack for the applicant; Bob Bass for the responding party.

DECISION OF PAMELA CHAPMAN, VICE-CHAIR, AND BOARD MEMBER PAULINE R. SEVILLE; July 6, 1995

1. This is a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* ("HLDAA"), which was referred to the Board by the Minister on February 1, 1994. This reference followed a request by the union, on January 20, 1994, for a determination by the Minister that North Yorkers for Disabled Persons Inc. ("NYDP") falls within the jurisdiction of the HLDAA. The question which has been referred to the Board for its advice is the following:

Is North Yorkers for Disabled Persons Inc. a "hospital" within the meaning of the Hospital Labour Disputes Arbitration Act?

2. At the direction of the Board, the parties filed written representations concerning the question referred by the Minister. A hearing was then convened, at the outset of which the parties filed an "Agreed Statement of Facts" which set out most of the facts upon which they were relying. In addition, two witnesses were called by the employer, and one by the union, and a number of additional documents were admitted into evidence by agreement. We have considered all of the written material filed with the Board, together with the evidence and the oral representations of counsel made at the hearing in reaching our decision.

THE FACTS

- 3. As the statement of facts filed by the parties was quite lengthy, we will review it briefly rather than setting it out in full.
- 4. North Yorkers for Disabled Persons Inc. is a charitable, non-profit community service providing 24-hour attendant care to ten physically disabled adults in a group home located in North York.
- 5. The union holds bargaining rights for a single unit of employees which includes a total of fifteen full-time, part-time and relief attendants, one full-time cook, and one full-time house-keeper. The Executive Director, Manager of Operations and Manager of Tenant Relations are excluded from the bargaining unit.
- 6. The NYDP policy manual sets out the admission criteria for tenants of the group home, which is stated to be "determined by the physically disabled person's need for assistance with some or all of the activities of daily living". The following definitions are then provided:

Definitions:

- Disability a physical impairment or traumatic brain damage which prevents the individual from carrying out the activities of daily living:
 - unaided
 - without endangering self
 - within a conventional time period
- 2. Activities of Daily Living:

Basic activities include:

- mobility, transferring and positioning

- meal preparation, eating, clean-up
- rising, dressing, undressing, going to bed
- washing, grooming, shampooing, toileting including bowel and bladder procedures
- physical body control
- essential communication

Additional to basic include:

- laundry
- housekeeping
- banking

Assistance with these complementary activities may be provided if the disabled person meets the basic eligibility criteria. The disabled person must be unable to get assistance from home support or chronic care services because of the intensity, irregularity or unpredictability of the requirements over a twenty-four hour period.

- 7. Other selection criteria provide that those persons accepted for residency must be over 18 years of age, must be capable or potentially capable of directing their own care and of determining the need for assistance, must require assistance because the disability is likely to be permanent, but must be able to have medical needs met by the existing community health network. No more than 70% and no less than 50% of the tenants are either non-verbal or speech-impaired, defined as follows:
 - 1. Applicants will be assessed according to the following definitions of speech ability:

Non-verbal: requires a specialized skill beyond listening to be understood.

Speech-impaired: requires a familiar listener to be understood.

Verbal: can be understood by the general public.

- 8. Priority is given to those residing in institutions or whose only alternative is an intolerable living situation. At least one-third of the space is allocated to those tenants who need at least three hours of attendant care daily.
- 9. We were provided with information about the 10 current tenants of the home. There are presently five females and five males, all of whom have been in residence for more than two years, and the majority more than nine years. Eight of the tenants have cerebral palsy, one has spina bifida, and the tenth was disabled by a stroke. As a result of these disabilities the clients have a number of special needs and restrictions on their abilities. Nine use wheelchairs for mobility, and the tenth sometimes requires assistance in walking. Attendants are required to lift and move seven of the tenants, sometimes using mechanical lifts. Four of the tenants are non-verbal and use a speech board for communication; three others have speech impairments. Eight of the tenants require assistance with toileting, which may include the use of bedpans, catheters, leg bags and/or enemas; tenants are occasionally incontinent. Two of the tenants take medication regularly, and others may from time to time require medication which is administered by the attendants pursuant to doctors' instructions.

- 10. Generally, attendants assist tenants with the activities of daily living, which include bathing, grooming, dressing, toileting, eating, laundry, shopping, banking, attending at appointments, reading, telephone and other communications, and housekeeping. The cook shops for and prepares all meals during the week; attendants cook on the weekends. The housekeeper cleans the facility, including tenants' personal space. Four of the tenants can feed themselves, one is finger fed and the others are assisted by having food placed in their mouths or cut up for them. The nonverbal and speech-impaired tenants cannot be easily understood by the average person without their communication equipment and an attendant is often required to facilitate their communication with others.
- All of the tenants are active outside of the group home. Many of them are enrolled in college and other educational programmes and some work, including one tenant who works one day a week performing clerical work for NYDP. Tenants are also involved in wheelchair hockey, church groups, and some are active in the disabled community, attending meetings and sitting on boards. Many of them travel regularly. Generally, they either do not require attendant care outside of the home, or they retain personal attendants or receive attendant care from other sources when they are away from NYDP.
- 12. The parties characterized the personal care needs of the tenants as "low", "medium", or "high", with reference to standards established by the Ministry of Community and Social Services ("COMSOC"). Four of the tenants require a high degree of care, and are provided with extensive assistance in getting out of bed, showering, dressing, washing, grooming and moving in and out of wheelchairs. Three require medium care with these functions, and the remaining three a low amount of care.
- 13. The Board heard evidence about the extent to which tenants are capable of directing their own care, as this fact, or at least its characterization, was in dispute. As noted above, the admission criteria for NYDP provides that tenants must be able or "potentially able" to direct their own care; "potentially able" is defined as "lacking experience with community living as a result of being institutionalized or living in a family home which did not encourage independence". Cathy Samuelson, the Manager of Operations, testified about the means provided for tenants to direct their own care. When a tenant is accepted for residency at the group home, he or she enters into a "Service Contract" with NYDP, which sets out the tenant's support requirements. These requirements are then transferred to daily "Booking Sheets", which are kept in a binder for all of the residents. When an attendant completes required care, he or she notes the time to complete each task on the booking sheet. Tenants may amend the booking sheets from time to time, for example when they are not going to be at the home. If services not set out on the booking sheet are performed, staff add a handwritten notation to that effect.
- 14. According to Samuelson, all of the tenants are capable of directing their own physical care, and all but one can direct their medical care as well. One tenant requires the assistance of her mother to direct attendants concerning her medical requirements.
- Diane Walter testified as a witness for the union on the issue of direction of care. She has been an attendant at NYDP since 1989. In her view, two of the residents are not capable of directing their own care on a consistent basis, and the others are not fully capable of directing all of their care. With respect to the first two, attendants generally follow a standardized care plan. In other instances, care is provided by attendants at their own initiative, for example when a resident is incontinent and this is observed by an attendant. In addition, attendants are often able to anticipate the care required by the residents as they are familiar with their needs.

DECISION

16. In order to answer the question referred by the Minister, reference must be had to the definition of "hospital" in the HLDAA:

"hospital" means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged.

- 17. It was not disputed that the question for the Board in the present case is whether or not NYDP is an "other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons". The responding party disputed, however, the application of any part of that definition to NYDP, submitting that the assistance with the activities of daily living provided by staff of NYDP does not constitute "observation, care or treatment" as those terms appear in the HLDAA, that the disabilities of the tenants are not "physical or mental illness, disease or injury", and that NYDP cannot be considered an "institution" within the meaning of the definition.
- 18. In a decision released since the hearing in this matter, George Jeffrey Children's Treatment Centre, [1994] OLRB Rep. Dec. 1656, the Board considered and commented upon arguments very similar to those made by the responding party in the present case. While we have not relied upon that decision in reaching our conclusion, the reasoning of the Board in George Jeffrey captures some of our thoughts in the present case, and for that reason it is convenient to reproduce an excerpt from that case. Beginning at paragraph 34, the Board made these comments:
 - 34. Counsel took the position that in interpreting the term "other institution" I must consider whether or not George Jeffrey bears sufficient resemblance to other types of institutions specifically named in the section, that is hospitals, sanitariums, sanatoriums, nursing homes and homes for the aged. The qualities which he asserted are common to these facilities are their medical nature, the fact that there is a residential or custodial component to the facility, and that the clients are ill, diseased, injured, or chronically ill. The employer argued that none of these factors are present here.
 - 35. The argument that the observation, care or treatment of persons in a HLDAA institution must be of a medical nature has been previously considered by various Ministers of Labour and also by the Divisional Court. In *Dignicare Incorporated c.o.b. as Orleans Community Health Centre*, (Divisional Court, File No.462/90, February 12, 1991, unreported), the Court quashed the decisions of two Ministers that the institution in question was not HLDAA designated, stating as follows:

...(T)he Ministers erred in determining that an institution would fall within the definition of "hospital" in the Act only if the care, observation or treatment provided by the institution was of a medical nature and only if the institution was similar in nature to a hospital, sanatorium, sanitarium, or nursing home...In our view, in light of the purpose of the Act the observational care provided by an institution to its residents need not be of a medical nature to bring the institution within the definition of "hospital" and within the scope of the Act...

36. The argument about medical nature made by the employer in the present case appears to be exactly the one rejected by the Divisional Court in *Dignicare*. Counsel for the employer submitted, however, that the Court in that decision did not preclude the consideration of whether or not the care was of a medical nature, but only said that it must not be the only basis for a determination under HLDAA. I cannot accept this argument, given the clear statement by the Court that the observation, care or treatment referenced in the Act need not be of a medical nature.

For this reason, even if I conclude as the employer urged that none of the observation, care or treatment provided by staff to the clients in the residential care program is of a medical nature, this does not assist me in answering the question referred by the Minister. I am satisfied, and it was not seriously disputed by the employer, that the services provided by staff to the clients of the group homes do constitute observation, care or treatment, which are the terms set out in the HLDAA.

- 37. Continuing with his argument about the essential qualities of the enumerated institutions in the definition, counsel for the employer submitted that group homes operated by George Jeffrey are not residential in the same sense as a hospital or nursing home, as they are not "institutional" in nature. Instead, they are very much "homes", as should have been clear from the view I took of the three residences.
- 38. With respect, I have concluded that this is a distinction without substance. The group homes in question are not private homes, but are fully staffed residences offering services unavailable to those living in private homes. In that sense, they can properly be termed "institutions" as that term appears in the HLDAA.
- 39. I must comment that the employer's arguments on this point, and in other parts of counsel's submissions, seem to arise from its abhorrence of the concept of "institutionalization", which it seems to link with the terms "institution" and "hospital" as they appear in HLDAA. It is understandable that an agency like George Jeffrey, which is based on a commitment to "deinstitutionalization" and "independent living", would attach a stigma to the term "institutionalization". The use of those terms in the HLDAA, however, has nothing to do with arguments about the best way to deliver services to persons with special needs, in the community or elsewhere, but rather is focused entirely on a narrow labour relations purpose: to ensure the continuation of services to persons with special needs as defined in the HLDAA, wherever they are delivered, in the event of a breakdown in collective bargaining.
- 40. The final part of the employer's argument about the analogy between "other institutions" and those enumerated in the HLDAA definition had to do with the question of whether or not the clients of George Jeffrey are ill, chronically ill, diseased or injured. This would seem to be a relevant question even if I do not accept the employer's assertion that an "other institution" must be similar to those named in the section, given that the definition of "other institution" goes on to say that it must be operated for the care, treatment or observation of "persons afflicted with or suffering from any physical or mental illnesses, disease or injury" or "convalescent or chronically ill persons".
- 41. George Jeffrey argued that the disabilities, both physical and developmental, which the clients in the residential care program suffer from are not illnesses, diseases or injuries, as they are permanent conditions which cannot be treated with a view to a cure. Again, this is a distinction which I cannot accept. First of all, the very language used in the definition seems to contradict the notion of a "cure" being integral to the idea of an illness, disease or injury, as it specifically goes on to refer to chronic illnesses. Secondly, any dictionary definition would counter this assertion (see for example the definitions cited at paragraph 63 of the Board's decision in *Surex Community Services*, *supra*, reproduced in paragraph 42 below).
- 42. In Surex Community Services, supra, the Board faced an argument by the employer that developmental handicaps did not fall within the terms "physical or mental illnesses, disease or injury". The Board dealt with this argument as follows:

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- 63. Counsel for Surex argued that Surex residents are not persons "afflicted with or suffering from any physical or mental illness, disease or injury" and are not "chronically ill persons". The Shorter Oxford English dictionary (Third Edition, Volume I) defines the words "illness, "disease", "injury", and "chronic" as follows:
 - **Illness ... 3.** Bad or unhealthy condition of the body (or, formerly, of a part); the condition of being ill (ILL a.8) disease, ailment, sickness. ...

- **Disease ... 2.** A condition of the body, or of some part or organ of the body, in which its functions are disturbed or deranged. ...
- **Injury ... 3.** Hurt or loss caused to or sustained by a person or thing; harm, detriment, damage; an instance of this ME. ...
- Chronic ... 2. ... Lasting a long time, lingering, inveterate; opp. to acute 1601
- 64. From the evidence and submissions before me, it is clear that all of the residents of Surex suffer from some medical problem which has caused them to be developmentally handicapped. The residents suffer degrees of developmental handicap ranging from mild to profound. Those with more severe forms of developmental handicap need a great deal of care to manage the most basic tasks of daily living. Dr. Jacobs, in his evidence, agreed that to be developmentally delayed is a permanent condition of mental retardation. He, however, was of the view that one should look to each individual's capability or potential rather than at his or her disability. One does not have to disagree with Dr. Jacobs' latter proposition to find that the residents of Surex have special needs because of their physically and mentally impaired conditions, needs which can only be met through the provision of specialized care, observation, and treatment.
- 65. In addition to their developmental handicaps, the majority of Surex residents also suffer from some other medical condition. Epilepsy, Scoliosis, Schizophrenia, Manic Depressive Disorder. Alzheimer's Disease, and various forms of mental illness are found among the resident population.
- 66. I am satisfied that on a purposive reading of the definition of "hospital" in the HLDAA, and having regard to the dictionary definitions of "illness, disease or injury", the services provided by Surex fall within the "hospital" definition to the extent that Surex is an institution which is operated for the observation and care of persons who are afflicted with or suffer from physical and mental illnesses, diseases or injuries. This finding is not to be taken to suggest that a developmental handicap is a disease or a mental illness, but it is to say that a developmental handicap may be the result of a disease, illness or injury experienced pre-natally or during birth. Surex residents have sustained some hurt or loss of functioning, and the normal functioning of their persons has been chronically disturbed. In any event, I see no reason to distinguish between conditions brought about by disease, illness or injury, and the disease, illness or injury itself, especially where the level of care required to deal with the person's condition may be greater than that provided by hospitals. In addition to being persons with developmental handicaps, most of the residents of Surex do also suffer from other physical and mental illnesses which require special observation, treatment, and the administration of medication.
- 43. That reasoning is equally applicable to the present case, where each of the residents have either a physical or developmental disability which was caused by some underlying medical condition or injury. In most cases, in fact, residents have both physical and developmental disabilities, and may have other related impairments, such as difficulties with speech. In any case, I am satisfied based on the evidence about the residents which is detailed above, that they can all be said to suffer from "physical or mental illnesses, disease or injury", or indeed are "chronically ill" as those terms appear in the HLDAA.
- 19. Both the George Jeffrey and Surex decisions differ from the factual circumstances of the present case in that the residents of those group homes were developmentally delayed, in addition to having physical disabilities in many cases. Counsel for the responding party emphasized this distinction, arguing that the comments of the Board in paragraph 66 of the Surex decision (quoted in paragraph 42 of George Jeffrey above) applied only to developmental disabilities, and not to physical ones. Upon careful review, we are satisfied that this distinction is not a tenable one, having regard to the language of the HLDAA, and to the comments of the Board in Surex. The Board in

that case noted that developmental handicaps may be the result of disease, illness or injury experienced pre-natally or during birth, with the result that persons suffering these handicaps experience some hurt or loss of functioning, and the normal functioning of their persons are "chronically disturbed". The Board saw "no reason to distinguish between conditions brought about by disease, illness or injury and the disease, illness or injury itself". This reasoning applies equally to the types of physical disabilities experienced by the tenants of NYDP: in each case, their disabilities are caused by some underlying illness or injury, such as cerebral palsy, spina bifida, or a stroke.

- 20. It is also significant that the Board in *Surex* noted that in addition to developmental delay, most of the residents suffered from some other physical or mental illness which required special observation, treatment, or the administration of medication. This observation confirms that the Board's conclusions concerning the application of the HLDAA to the residents in *Surex* were not limited to the issue of developmental delay. Indeed, a review of the facts in that case confirms that some of the residents suffered from the same physical conditions experienced by the tenants at NYDP. For these reasons, we are satisfied that the tenants at NYDP can be said to require care because of some "disease, illness or injury".
- 21. Another distinction drawn by counsel for NYDP between the tenants of NYDP and the persons considered by the Board in Surex and by the Minister of Labour in earlier decisions, was their ability to direct their own care. With respect, we are unable to conclude that this factor has any relevance to the question before us. The emphasis in the definition of "hospital" in the HLDAA appears to be on the provision of care, and on the reason for that provision, but there is absolutely no reference to the issue of self-direction. Indeed, given the nature of the institutions specifically enumerated in the definition (hospitals, sanitariums and sanitariums, nursing homes and homes for the aged) reference to the ability to direct one's own care as excluding one from the definition would make no sense, as most of the persons receiving care in these types of institutions would be able, and indeed expected, to direct their own care. While it is understandable that selfdirection forms an important part of the philosophy of NYDP, and presumably of many community services like it, it simply does not relate to the legal question raised by an application under the HLDAA, which is, as noted above, focused entirely on the need for certain care arising from a condition of the person. There is no dispute that the tenants of NYDP require care; indeed, that is a prerequisite for their admission to the group home as is revealed by the tenant selection criteria reviewed above.
- 22. For the same reasons, the degree of independence enjoyed by the tenants of NYDP is not a factor central to the exercise before us, except as it relates to the amount of care required by reason of their disabilities. Counsel for the employer relied upon a decision of the then Minister of Labour on March 28, 1988, in an application under HLDAA with respect to *Bellwoods Park House and Service Employees International Union, Local 204*, in support of his arguments about the significance of the ability of the NYDP tenants to direct their own care, and of their degree of independence. It is significant, however, that this decision was made by the Minister of Labour prior to the decision of the Divisional Court in *Dignicare*, *supra*. Having regard to the comments of the court in that decision about the approach to HLDAA determinations taken by the then Minister of Labour, an approach which appears to have been taken by various other Ministers prior to *Dignicare*, such ministerial decisions may be of little value in considering the appropriate approach to the definition in the HLDAA. In any event, there are insufficient facts provided in the *Bellwoods* decision concerning the nature and degree of the personal care provided to residents for any comparison with NYDP to be useful.
- 23. In determining whether or not NYDP provides "observation, care or treatment" within the meaning of the HLDAA, we are of the view that it is appropriate to consider the nature and

the extent of the care provided, and the extent to which a withdrawal of that care would endanger the continued health or safety of those in receipt of the care. In the present case, the care provided by attendants is extremely personal and seems fundamental to the well-being of the tenants. Furthermore, much of the care provided is closely related to the disabilities experienced by the tenants, as assistance is provided with movement, communication and various motor skills which have been impaired. Indeed, some of the care provided, such as assistance with medication and various aids around toileting, is somewhat medical in nature.

- 24. It is also fair to say that care is provided to a great extent, as most of the tenants have requested and receive assistance with virtually all aspects of their personal care. Four of the residents were defined by the parties as "high-care", with a further three requiring a medium amount of care; the policy manual requires that at least one-third of the vacancies be set aside for tenants requiring at least 3 hours a day of attendant care.
- 25. Finally, having regard to the information provided by the parties about the condition of the tenants and the care they normally require, it is reasonable to conclude that a withdrawal of services by their normal care giver would likely result in a deterioration of their conditions. This is a particular concern where, as here, a majority of the tenants are non-verbal or speech-impaired, and would thus have difficulty communicating with an unfamiliar attendant. This factor was considered by the Board in both the *Surex* and *George Jeffrey* decisions.
- 26. For all of these reasons, we are satisfied in the present case that the extent and nature of the care provided by staff to the persons occupying NYDP falls clearly within the terms "care, observation or treatment" in section 1(1) of the HLDAA, regardless of the fact that it is largely care of a personal rather than a medical nature, relating to the activities of daily living. This approach is in our view consistent with the decision of the Divisional Court in *Dignicare*, *supra* (quoted above in paragraph 35 of the *George Jeffrey* decision).
- 27. Finally, we are satisfied that the group home operated by NYDP is an "institution" within the meaning of the HLDAA. It cannot be considered a private home for numerous reasons, including the funding received from public sources, the nature of its facilities and the services provided by staff, and the nature of the legal relationship between tenants and NYDP as evidenced by the "Service Contract" and "Lease" executed by tenants. Indeed, it is clear from the policy manual filed by the responding party that residence at the group home is considered to be something other than residence at "home", as admission is contingent on an applicant being "unable at present to obtain required care from home support programs".
- 28. For all of the reasons set out above, therefore, it is the Board's advice to the Minister that North Yorkers for Disabled Persons Inc. is a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*.

DECISION OF BOARD MEMBER S. C. LAING; July 6, 1995

- 1. The Board must be prepared to determine that there are health related services which in their delivery, are not properly characterized as "observation, care or treatment". In this case it is crucial and in my view, determinative that the tenants of North Yorkers for Disabled Persons Inc. are capable of directing their own care and determining their own need for assistance.
- 2. Although theoretically, the majority's designation of this home as a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act* is limited to labour relation matters; the reality of this label is much broader and rather alarming.

- 3. The philosophy of this home and the criteria for tenancy, clearly reinforce the fundamental principle that these tenants are in control of their own care and continually strive for independence.
- 4. The institutionalization of such a home runs contrary to the progressive direction taken and the commitment held at North Yorkers for Disabled Persons Inc.
- 5. With respect, I cannot agree with such a finding.

0793-95-R Negotiations and Research Employees Union, Applicant v. Public Service Alliance of Canada, Responding Party v. Alliance Employees' Union, Intervenor

Certification - Bargaining Unit - Union making timely certification application and seeking to "carve out" about a dozen employees holding two classifications in existing 85 person bargaining unit - Board finding union's proposed bargaining unit not appropriate - Certification application dismissed

BEFORE: R. O. MacDowell, Alternate Chair.

APPEARANCES: Ron Cochrane, Luc David, Mike McNamara, Doug Marshall and A. Truong for the applicant; Jean Y. Desrochers and Brian Reid for the responding party; Shane O'Brien and Lucette Charron for the intervenor.

DECISION OF THE BOARD; July 12, 1995

I

1. In order to make this decision easier to read, the parties may sometimes be referred to in abbreviated form. The applicant may be referred to as the "NREU", the responding employer may be referred to as "the employer" or "PSAC", and the intervenor, (an incumbent union) may be referred to as the "AEU".

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- 2. This is an application for certification.
- 3. There is no dispute that the applicant is a "trade union" within the meaning of the Act (i.e., it is an organization of employees formed for purposes that include collective bargaining).
- 4. There is no dispute that this certification application is "timely".
- 5. However, there is a dispute about the description of the appropriate bargaining unit.

*

6. The applicant seeks to represent a bargaining unit of about a dozen employees who work for PSAC in Ottawa, and occupy two job classifications: "negotiator" and "researcher".

These employees are currently part of a larger bargaining unit represented by the AEU. The AEU bargaining unit has about 85 employees. The NREU seeks to "carve out" about a dozen employees from the AEU unit, and group them in a new, separate, bargaining unit of their own.

- The employer and the AEU both contend that it is inappropriate to carve out these two classifications from an existing bargaining unit. In their submission a "carve out" of this kind is inconsistent with the scheme of the Act, and is contrary to long-standing Board policy precluding the subdivision of already established more broadly defined bargaining units (see for example cases such as: Hamilton Automobile Club, [1984] OLRB Rep. Jan. 35 (rejecting a carve out of dispatchers); Cryovac, [1981] OLRB Rep. Nov. 1574 (rejecting a carve out of the quality control department); Ontario Hydro, [1980] OLRB Rep. June 882 (rejecting a carve out of nuclear technicians from a provincial unit); Westeel-Roscoe Ltd., [1979] OLRB Rep. Nov. 1125 (rejecting a carve out of the advertising department); Wellesley Hospital, [1976] OLRB Rep. Feb. 45 (rejecting a carve out of skilled maintenance employees); McMaster University, [1973] OLRB Rep. Feb. 102 (rejecting a carve out of non-professional library employees); Toronto General Hospital, [1972] OLRB Rep. Jan. 33 (rejecting a carve out of operating engineers); Telfer Paper Box Co. Ltd., [1963] OLRB Rep. Nov. 452 (rejecting a carve out of printing pressmen); Shelburn Residence, [1991] OLRB Rep. Aug. 1005 (rejecting a carve out of registered nurses); Villacentres Management Ltd., [1979] OLRB Rep. April 359 (rejecting a carve out of nurses); Canadian Red Cross Blood Transfusion Service, [1978] OLRB Rep. May 408 (rejecting a carve out of a local group of employees from a provincial bargaining unit); Abex Industries Ltd., [1985] OLRB Rep. Oct. 1429 (rejecting a carve out of operating engineers); Riverdale Hospital, [1974] OLRB Rep. May 271 (rejecting a carve out of various hospital technologists)).
- 8. The employer and the AEU submit that the Board has rarely if ever permitted the subdivision of an established bargaining unit, and should not do so except in extraordinary circumstances none of which are present here. They urge the Board not to add another unit (and union) to the existing collective bargaining situation.
- 9. The NREU replies that its proposed bargaining unit encompasses a group of employees with a sufficiently coherent community of interest to support viable collective bargaining without, at the same time, creating serious labour relations problems for the employer. The NREU submits that its proposed unit is necessary to facilitate employee choice with respect to trade union representation; moreover, in an already fragmented bargaining structure (there are currently five separate units) the employer can tolerate a little more fragmentation.
- 10. The factual background is not substantially in dispute although, of course, the parties characterize those facts rather differently.

II

- 11. The responding employer is a large national trade union with offices across Canada. It is the collective bargaining agent for thousands of employees (primarily in the public sector) in some 180 different bargaining units.
- 12. Like most large trade unions, PSAC has a compliment of office, administrative, technical and professional staff, employed to meet the needs of the PSAC membership. These employees, too, are scattered across Canada. PSAC's head office is in Ottawa.
- 13. For collective bargaining purposes, PSAC's employees are already divided into five separate bargaining units. Three of those bargaining units are represented by the AEU. A labour

organization known as "CULE" represents two other bargaining units. The relative size of these bargaining units is as follows:

AEU Unit #1

AEU Unit #2

AEU Unit #2

AEU Unit #10

CULE Unit #1

CULE Unit #2

- 85 employees

- 22 employees

- 55 employees

- 35 employees

The individuals that the applicant seeks to represent are currently members of AEU bargaining unit #1, which was established in 1978.

- 14. The bargaining structure is already quite fragmented; however, over the years and successive rounds of bargaining, the collective agreements for the various units have become increasingly congruent. For example, there is portability of seniority and a common system for posting job opportunities; moreover the bargaining tends to follow a pattern. But the collective bargaining outcomes have not always been the same. Because each unit is a separate negotiating district and there are two unions involved, there have been differences in what has been negotiated from time to time, and there have been occasional work stoppages involving one union and bargaining unit but not the others.
- 15. The AEU and CULE collective agreements all have provisions permitting employees to respect the picket line of another union. If there is a strike or lock-out at their place of work, they are not required to cross a picket line in order to attend work. In other words, a strike in one unit immediately spills over into the others. And if a work stoppage by a sister unit (or union) interrupts the flow of work, the collective agreement permits PSAC to lay off the affected employees in other units.
- 16. The dozen "negotiators" and "researchers" that the applicant seeks to represent are engaged in collective bargaining on behalf of PSAC's members, either as direct spokespersons at the bargaining table, or in a support capacity. They have their own job title, and there is no doubt that their functions are identifiable, distinct, and different from the functions performed by PSAC employees with other job titles such as education officers, financial and accounting staff, computer personnel, and so on. The negotiators and researchers mostly do their own work and do not interact on a daily basis with other employees.
- 17. However, I am not persuaded that, for collective bargaining purposes, there is a substantial or significant difference between the work situation of researchers and negotiators, and the work situation of other employee groupings in the various AEU or CULE bargaining units. As the employer put it: it has lots of employees who travel a good deal, work long or irregular hours, work without direct supervision, and so on. Other classifications computer or finance personnel, for example also work in self-contained work groups. And the negotiators that the NREU seeks to carve out from AEU bargaining unit #1 are not even the only "negotiators" employed by PSAC. There are already "negotiators" in another bargaining unit.
- 18. There is not much interchange between employees in the researcher and negotiator classifications in the AEU bargaining unit and employees in other classifications or other units. There is no established progression through these job hierarchies. However, two of the six negotiators have actually come from other bargaining units. In their case, there has been interchange. But, all of the researchers have been hired from "outside".
- 19. There is no evidence of any inter-unit transfers caused by "downsizing" or lay-off. It is

not clear whether senior qualified individuals from one bargaining unit would be able to displace junior employees in another bargaining unit. What is clear is that such movement to protect seniority might be inhibited if the number of units is multiplied.

- 20. The negotiators say that they have not been happy with the way in which their interests have been represented by the AEU in collective bargaining (hence this application). They believe that they have special skills which have not been sufficiently recognized, remunerated, or promoted by the trade union. They submit that the AEU's bargaining strategy over the years has resulted in some compression of wage differentials.
- 21. The applicant mentioned two specific incidents which illustrate its members' concerns.
- Some years ago PSAC introduced the "Hay system" of job evaluation, which resulted in "red circling" arrangements that were later the subject of controversy among the negotiators. The issue was the subject of collective bargaining, and was thought by them to be a strike issue. But, at the time, it was not considered practical or prudent to precipitate a work stoppage on an issue that affected only six members of the bargaining unit. On another occasion, the negotiators and researchers suggested a wage freeze, but the bargaining unit as a whole decided that it would press for a wage increase. In both instances, the views of the majority prevailed.
- 23. On the other hand, it is interesting to note that 7 of the 12 NREU members have been actively involved in the AEU, either chairing committees or participating in AEU collective bargaining committees. In other words, while the views of these individuals have not necessarily prevailed, they have not been excluded from the decision-making processes within the union. Nor is it suggested that the AEU has acted improperly in any way, or that the NREU members have been represented in a manner that is arbitrary, discriminatory or in bad faith. It is simply that their interests may not be paramount and their views may not prevail if they are part of a larger bargaining unit. That is why they want their own bargaining unit, and their own collective agreement.
- And that is why the AEU and PSAC contend that the purposed bargaining unit is not appropriate. In their submission there is nothing to distinguish researchers and negotiators from other small groups of employees in the same job classification. By definition, each classification encompasses employees with skills that are different from other classifications. On the applicant's theory, each such group could plausibly claim that they are "different" and, that from time to time, their minority concerns are not promoted by the union. But that is no reason to further fragment a bargaining structure which already has 5 separate units. PSAC and the AEU reiterate that the Board has *never* defined bargaining units in respect of one or two classifications, let alone carved such classifications out of an existing bargaining unit.

III

25. The issue of "fragmentation" is not a new one for the Board, either on an initial application for certification or, as here, where one trade union seeks to "carve out" a group of employees from an existing bargaining unit represented by another union. In both situations there has been a strong resistance to fragmented or narrowly defined bargaining units - even though small groups of employees might want "their own union" or "their own unit". The labour relations concerns underlying this resistance are outlined in cases such as *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250 where the Board observed:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A

proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

The Board in Bestview was saying nothing knew. Precisely a year before in *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371 another panel of the Board gave a much more elaborate explanation of the competing concerns underlying the determination of "appropriateness":

- 13. The concept of a bargaining unit performs two quite distinct functions in labour relations law. In order to be certified, a trade union must enjoy the support of a majority of employees in a bargaining unit. The unit serves as an electoral district in this setting. After a union is certified, the bargaining unit found by the Board to be appropriate strongly influences the conduct of collective bargaining. Although the parties sometimes vary this unit description, it is frequently simply reproduced in the recognition clause in a collective agreement.
- 14. A trade union may experience unsurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.
- 15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.
- 16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.
- 17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers designed to enhance the job opportunities of employees within the walls that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably

spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differentials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the Board responded to this industrial relations conundrum? The decision in K Mart Canada Limited, supra, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been "hard pressed" not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

26. The determination of "appropriateness" requires a balance of competing collective bargaining concerns. But one thing is clear. A patchwork quilt of bargaining units is a recipe for indus-

trial unrest - if only because in an integrated enterprise, it takes only one collective bargaining breakdown to start the whole system unravelling.

- I do not think that it is necessary to multiply the examples. In an unorganized situation narrowly defined bargaining units have generally been rejected, unless the employee grouping met the "craft definition" required by section 6(3) of the Act, or the economic setting demonstrated that an overly broad bargaining unit definition however desirable would pose a barrier to the establishment of any collective bargaining at all. Thus, in *Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900, the Board rejected a bargaining unit limited to the "English as a second language teachers" who worked in the English Department of the employer's Continuing Education Programme. In *Kidd Creek Mines Limited*, [1984] OLRB Rep. Mar. 481 and [1986] ORLB Rep. June 736, the Board rejected a bargaining unit of certified electricians who worked in a mine operation with hundreds of other employees. And more recently, in *Sifton Properties Limited*, [1993] OLRB Rep. Oct. 1010, the Board rejected a unit of maintenance and cleaning employees who worked in conjunction with a broader grouping of employees in the employer's property management business.
- 28. The Board's reluctance to sanction fragmentation is even more pronounced in the so-called "carve out cases", where a new union seeks to subdivide a bargaining unit that has already been shown to be appropriate, and the employees in question are already represented by another union. In *Ontario Hydro*, [1980] OLRB Rep. June 882, the Board described the situation this way:

... While there is a strong presumption in favour of the incumbent trade union's bargaining unit, the Board is willing to entertain evidence and submissions on why the status quo ought not to be maintained. The incumbent trade union may clearly have failed to represent a distinct and cohesive group adequately, a problem that has sometimes reared its head in the relationship of skilled and unskilled employees. This problem of unsatisfactory representation may be combined with a capacity in the employer to tolerate somewhat greater fragmentation, particularly if the smaller unit sought can meet the principles of appropriateness generally applied to certification cases. ...

But despite the possibility of a "carve out" mentioned by Vice-Chair Adams in *Ontario Hydro*, the fact is that the Board has almost never permitted a carve out and consequent fragmentation, even where the incumbent union has not properly considered the interests of a minority (see for example the discussion in *Corporation of the City of Thunder Bay*, [1984] OLRB Rep. July 1032, where the Board granted a variety of remedies but was not prepared to subdivide the bargaining unit). The hypothetical mentioned in *Ontario Hydro* has not materialized or been established in fact. Indeed, the representative of the applicant candidly conceded that he was unable to find any cases where the Board had actually accepted the "appropriateness" of the kind of carve out that he was proposing in this case: hiving off a dozen employees into their own, sixth, bargaining unit.

- 29. I might also observe, parenthetically, that the legislative drift, in Ontario and elsewhere, is toward broader bargaining structures, not narrower ones. Section 6 of the Act no longer requires the Board to carve a group of skilled employees from a broader "industrial" bargaining unit, even where the employees concerned meet the craft definition (which the employees here do not). Section 7 now recognizes both the utility and desirability of combining existing bargaining units. There is legislated province-wide bargaining in the construction industry. And in the federal jurisdiction, the Canada Labour Relations Board has effected significant consolidation of bargaining units in the airline industry, the railways, the post office and elsewhere.
- 30. Against that background, it seems to me that there is an onus on the applicant to establish that its proposed bargaining unit comprising two classifications and twelve employees is

indeed "appropriate" given their presence in a well-established broader based bargaining unit represented by the AEU.

- 31. In my view, the applicant has not met that onus.
- Researchers and negotiators do not constitute a "craft" within the meaning of the Act, nor, in my view, are their functions, terms and conditions of employment or work situation significantly different from other employees working for PSAC at least for the purposes of bargaining unit determination. No doubt there are differences in job function, hours of work, and salary (but not, it seems, the evaluation system upon which salary rankings are based). However, there is nothing unusual about that. That is the case in almost any large workplace.
- Nor is there anything particularly unusual about the employees' concern that their particular interests do not prevail in their bargaining unit, or that their collective bargaining objectives may be a little different from those of other employees. That too is quite common in any large employee grouping (consider a hospital, for example, where there are hundreds of employees with distinct skills [physiotherapists, pharmacists, etc.] and an elaborate job hierarchy see the observations of the Board in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 at para. 14 and compare the Board's approach in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459). But that does not mean that each classification should have its own bargaining unit, its own negotiating process, and its own collective agreement. The kinds of frictions outlined by the applicant are to be expected in any bargaining unit of any size, and they do not support the assertion that the bargaining unit should be subdivided merely because such frictions occur from time to time.
- 34. There is no suggestion here of "inadequate" representation of the kind contemplated by the Board in *Ontario Hydro*. Nor would that by itself justify fragmentation with its obvious adverse consequences for the employer. And I do not give much weight to the applicant's submission that: because the bargaining structure is already considerably fragmented "just one more" unit could be tolerated.
- 35. In summary, I have some doubt that a bargaining unit comprising only two classifications in an employer's organization would ever be appropriate in an unorganized setting (see again *Kidd Creek Mines* above). But, where, as here, the target employees are already part of another bargaining unit and granting the applicant's request would further fragment an already divided bargaining structure, I do not think that the proposed bargaining unit is "appropriate". The situation here does not fall within the parameters identified by the Board in *Ontario Hydro*, nor, on balance, do the circumstances support the conclusion that the applicant's proposed unit is "appropriate for collective bargaining" in the existing setting.
- 36. For the foregoing reasons, the Board finds that the appropriate bargaining unit for a "displacement certification application" such as this, is the existing bargaining unit currently represented by the AEU. To put the matter colloquially: the new union must accept the existing bargaining unit as it finds it. If it wishes to displace the AEU, it must "take" what the AEU already has.
- 37. Members of the applicant comprise only a small minority of the employees in the above-mentioned AEU bargaining unit the unit which I find in this application to be appropriate for the purposes of collective bargaining. The NREU does not meet the 40 per cent support threshold required by section 8 of the Act.
- This application for certification is therefore dismissed.

4001-94-G; 4008-94-G; 4010-94-G; 4011-94-G; 4017-94-G; 4019-94-G; 4021-94-G; 4023-94-G; 4024-94-G; 4025-94-G; 4026-94-G; 4027-94-G; 4030-94-G; 4032-94-G; 4033-94-G; 4035-94-G United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800, Applicant v. Tesc Contracting Company Limited, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71, Applicant v. Robertson Mechanical Contractors, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71. Applicant v. S & R Mechanical, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71, Applicant v. Tesc Contracting Ltd., Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, Applicant v. Haller Mechanical Contractors Incorporated, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, Applicant v. INC Contractors Limited, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, Applicant v. Southern Mechanical Contractors Limited, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, Applicant v. The State Group Limited, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, Applicant v. Vollmer and Associates Contractors, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, Applicant v. C & C Plumbing, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, Applicant v. Clow Darling Plumbing & Heating, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, Applicant v. Axelsons Plumbing & Heating Ltd., Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, v. Venshore Mechanical Ltd., Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, Applicant v. Metro Plumbing & Heating Inc., Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, Applicant v. E.K.T. 90 Inc., Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, Applicant v. M. Dagsvik Mechanical Contractors, Responding Party

Construction Industry - Construction Industry Grievance - Board determining that amounts set out in Provincial Collective Agreement as payable by employers to various benefit funds are amounts exclusive of retail sales tax - Board allowing grievances alleging that employers failing to remit proper contribution amounts

BEFORE: Jules B. Bloch, Vice-Chair.

APPEARANCES: A. M. Minsky, Darrell Brown and Jerry Boyle for the applicants; Richard J. Charney, J. Timothy Lawson and Stephen S. Coleman for the responding parties.

DECISION OF THE BOARD; July 6, 1995

Background and Facts

- 1. These are grievances filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 ("Plumbers") pursuant to section 126 of the Act.
- 2. The grievances allege that the responding parties breached the collective agreement between the Mechanical Contractors Association Ontario ("the M.C.A.O.") and Ontario Pipe Trades Council ("Pipe Trades") (the Provincial Collective Agreement), in that the named companies failed to remit the proper contribution amounts. More specifically these matters involve the impact of the *Retail Sales Tax Act*, R.S.O. 1990, C.R. 31 ("R.S.T.A.") on the Provincial Agreement.
- 3. The responding parties submit that the Ontario Labour Relations Board is without jurisdiction to adjudicate on this matter. In the alternative they submit that they have paid the full amount of the contribution and the tax to the trustees of the various plans, since the employer contribution includes the tax component.
- 4. The Board issued a bottom line decision on May 15, 1995. The following are the full reasons in these matters.
- 5. The parties referred to the following section of the *Labour Relations Act* ("the Act"):

45.- ...

(8) An arbitrator or arbitration board shall make a final and conclusive settlement of the differences between the parties and, for that purpose, has the following powers:

. . .

 To interpret and apply the requirements of human rights and other employment-related statutes, despite any conflict between those requirements and the terms of the collective agreement.

. . .

6. The parties referred to the following sections of the Retail Sales Tax Act ("R.S.T.A."):

Sec. 1 Definitions — In this Act,

. . .

"funded benefits plan" means a plan, including a multi-employer benefits plan, which gives pro-

tection against risk to an individual that could otherwise be obtained by taking out a contract of insurance, whether the benefits are partly insured or not, and which comes into existence when the premiums paid into a fund out of which benefits will be paid exceed amounts required for payment of benefits foreseeable and payable within thirty days after payment of the premium.

. . .

"multi-employer benefits plan" means a trust established to provide employees of two or more unrelated employers protection against risk to an individual under a single funded benefits plan.

. . .

"planholder" means the person who provides a benefits plan, including an employer under a multi-employer benefits plan.

"premium" means,

- (e) in respect of a funded benefits plan,
 - any amounts paid into the plan by the planholder less any amounts paid to the planholder by members in order to receive benefits under the plan, and
 - (ii) any amount paid by members in order to receive benefits under the plan,

and includes dues, assessments, or administrative costs and fees paid for the administration or servicing of the plan to the vendor.

. . .

"vendor" means a person who, in the ordinary course of his business,

. . .

(f) is the planholder of a benefits plan or the person to whom the planholder or planholders of a benefits play pay premiums.

. . .

- 2(9) Determination of fair value. Where the Minister considers it necessary or advisable, he or she may determine the amount of any price of admission or of any premium, or the fair value of any tangible personal property or taxable service, for the purpose of taxation under this Act, and thereupon the price of admission, the premium or the fair value of the tangible personal property or taxable service, for such purpose shall be so determined by the Minister unless, in proceedings instituted by an appeal under section 25, it is established that the determination is unreasonable.
- 2.1 (1) Tax on insurance etc. Every person who is resident in Ontario, or who carries on business in Ontario, and who,

• • •

(c) is a planholder or member of a benefits plan; or

. . .

shall pay to Her Majesty in right of Ontario a tax at the rate of 8 per cent of the premium payable.

. . .

(11) When tax payable. — With respect to a premium referred to in clause (a), (b) or (c) of the

definition of "premium" in subsection 1(1), the tax payable under this section shall be collected by the vendor when the premium is paid to the vendor.

- (13) Same. With respect to a premium referred to in clause (e) of the definition of "premium" in subsection 1(1),
 - the tax under this section shall be collected by the vendor at the time the planholder paid the premium referred to in subclause (e)(i) of the definition to the vendor, or at the time the member paid the premium referred to in subclause (e)(ii) of the definition to the vendor; or
 - where the planholder also administers the plan, the tax shall be collected at the time the planholder received form the member the premium referred to in subclause (e)(ii) of the definition, and the planholder shall pay the tax on the premium referred to in subclause (e)(i) of the definition at the time and in the manner prescribed in the regulations.

. . .

(15) Person deemed purchaser. — Every person who is liable to pay tax under this section shall be deemed to be a purchaser for the purposes of assessment, collection and enforcement of this Act.

. . .

(19) Penalty assessment. — (1) The Minister may assess any penalty payable by a vendor under subsection 32(1) or (2) or by a person under subsection 15.1(3) or any amounts owing by a person dealing with a non-resident contractor who fails to comply with subsection 39(4).

. . .

- (22) Tax money is trust money. (1) Every vendor who collects any tax under this Act shall be deemed to hold it in trust for Her Majesty in right of Ontario and is responsible for the payment over of it in the manner and time provided under this Act and the regulations.
- The parties referred to the following Regulations made pursuant to the Retail Sales Tax 7. Act:

ONTARIO REGULATION 201/95

made under the

RETAIL SALES TAX ACT

Made: March 29, 1995

Filed: April 4, 1995

Amending Reg. 1013 of R.R.O. 1990

(General)

Note: Since January 1, 1994, Regulation 1013 has been amended by Ontario Regulations 62/94 and 375/94. For prior amendments, see the Table of Regulations in the Statutes of Ontario, 1993.

Section 3 of the Regulation is amended by adding the following subsection:

(5) If a person enters into a contract of insurance or a planholder provides a benefits plan and does not supply the vendor with a purchase exemption certificate as required by subsection (1) or a certification as required by section 3.1, 3.2 or 3.3, the vendor shall collect the tax imposed under section 2.1 of the Act.

. . .

7. Section 10 of the Regulation is revoked and the following substituted:

. . .

(5) If any person liable to pay tax under section 2.1 of the Act, other than under subsection 2.1(5) or (6) of the Act, pays a premium to the vendor that is less than the premium and the tax indicated by the vendor to be payable, the vendor shall calculate the tax collectable and payable by multiplying the amount paid by 8/108 and shall remit the product as tax under section 5.

ONTARIO REGULATION 162/95

made under the

RETAIL SALES TAX ACT

Made: March 28, 1995

Filed: March 29, 1995

Amending Reg. 1012 of R.R.O. 1990

(Definitions by Minister, Exemptions, Forms and Rebates)

Note: Since January 1, 1994, Regulation 1012 has been amended by Ontario Regulations 8/94 and 348/94. For prior amendments, see the Table of Regulations in the Statutes of Ontario, 1993.

. . .

- 3. Section 6 of the Regulation is revoked and the following substituted:
 - 6.(1) A purchase exemption certificate required by clause 3(1)(a), (b) or (c) of Regulation 1013 of the Revised Regulations of Ontario, 1990 may be either a single or blanket purchase exemption certificate and a purchase exemption certificate required by clause 3(1)(d) of Regulation 1013 shall be a blank purchase exemption certificate.

. . .

(10) If a person does not supply a vendor with a properly executed single or blanket purchase exemption certificate as required by subsection (1), the sale shall be deemed to be a retail sale and the premium shall be deemed to be a taxable premium.

• • •

- (13) If a sale is deemed to be a retail sale under subsection (1) of (12), the vendor shall collect tax on the tangible personal property or taxable service unless the tangible personal property or taxable service is otherwise exempt under the Act.
- (14) If a premium is deemed to be a taxable premium under subsection (1), the vendor shall collect tax on the premium unless the premium is otherwise exempt under the Act.

8. The parties referred to the following sections of the *Excise Tax Act*, R.S.C. 1985, Chap. E-14:

Part 9 Goods and Services Tax

Section 182: Forfeiture.

- (1) For the purposes of this Part, where at any time, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant, an amount is paid or forfeited by a person to the registrant otherwise than as consideration for the supply,
 - (a) the registrant shall be deemed to have made to the person, and the person shall be deemed to have received from the registrant, a taxable supply of the property or service for consideration equal to the consideration fraction of the amount paid or forfeited, as the case may be; and
- (2) Extinguishing debt, etc. For the purposes of this Part, where at any time, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by or to a registrant, a debt or other obligation (other than consideration for the supply) of the registrant to a person is reduced or extinguished without payment on account of the debt or obligation,
 - (a) the registrant shall be deemed to have made to the person, and the person shall be deemed to have received from the registrant, a taxable supply of the property or service for consideration equal to the consideration fraction of the amount extinguished or by which the debt or obligation was reduced, as the case may be; and
- 9. The parties referred to the following sections of the Workers' Compensation Act, R.S.O., 1990, C.W. 11:
 - 7 (8) Multi-employer benefit plans.— Subsection (1) does not apply to an employer who participates in a multi-employer benefit plan in respect of a worker if, throughout the first year after the work is injured whenever the work is absent from work because of the injury,
 - (a) the plan continues to provide the worker with the benefits to which the worker would otherwise be or become entitled under the plan; and
 - (b) the plan does not require contributions from the employer during the absence and does not require the worker to draw on the worker's benefit credits, if any, under the plan during the absence, 1989, c.47, s.3, part.
 - (9) Amendment of multi-employer benefit plans.— On and after the 2nd day of January, 1992, a multi-employer benefit plan shall contain and, if it does not do so, shall be deemed to contain provisions sufficient,
 - (a) to enable all employers who participate in the plan to be exempted under subsection (8) from the requirement to make contributions; and
 - (b) to provide each worker with the benefits described in subsection (8) in the circumstances described in that subsection. 1989, c.47, s.3, part, revised.
- 10. The parties referred to the following paragraphs and appendices of the Provincial Collective Agreement:

Article 19 - Government Legislation

19.1 Any Federal, Provincial or Municipal Legislation in effect, or hereinafter enacted, will

supersede any relevant clause in this Agreement without nullifying the remainder of this Agreement.

Article 30 - Continuation of Benefit Coverage

Effective May 13, 1992 the Contractor will contribute \$.03 per hour earned to the Local Union employee benefits plans of this collective agreement to assure continuation of benefit coverage as provided for in the Workers Compensation Act.

Appendix 1 (Thunder Bay Local 628)

C Welfare Fund

1. Each employer shall contribute to the Unions Health and Welfare Fund for each hour's pay earned by each of his employees, the sum of \$1.15. Refer to Article 30 for additional contribution related to continuation of benefits.

D Pension Fund

- 1. Each employer shall, contribute to the Union's Pension Fund a sum equal to two dollars and fifty-one cents (\$2.51) for each hours pay earned by each of his employees effective May 14, 1992.
- 2. The Pension Fund is administered by a Board of Trustees appointed by the Union under a Trust Agreement.

Appendix 3 (Sudbury Local 800)

C & D Health, Welfare and Pension

1. The Contractor shall contribute to Local 800 Health, Welfare and Pension Trust Fund, for every hour worked by each of his Employees, the following:

For Health & Welfare:

Effective May 14, 1992 - \$1.63 per hour. Refer to Article 30 for additional contribution related to continuation of benefits.

For Pension:

Effective May 14, 1992 - \$3.00 per hour, \$3.10 effective May 1, 1993; \$3.65 effective May 1, 1994.

Contribution forms shall be supplied by Local 800. These forms will be completed and forwarded with cheques for the contributions to the trustees designated by Local 800 before the 15th of every month following that in which the contributions were due.

2. The Contractor shall pay the following as liquidated damages and not as a penalty for late contributions:

One week late 5%
Two weeks late 10%
Three weeks late 15%
Four Weeks late 20%

- 3. On one month's notice, the Contractor shall check off increased amounts of employee's wages for the Health, Welfare and Pension Fund when authorized by the Union, but in no case shall the total gross wage package change; including all fringes.
- 4. On one month's notice, the Contractor shall reduce Health, welfare and Pension Fund contributions when authorized by the Union. The full amount of reductions shall be passed on to

Employees in the form of wages, but in no case shall the total gross wage package change; including all fringes.

Appendix 4 (Windsor Local 552)

C Welfare Plan

1. Effective May 14, 1992, \$1.80 for each hour earned by each employer; \$1.95 effective August 1, 1992; \$2.05 effective May 1, 1993; \$2.20 effective May 1, 1994 shall be forwarded to the Administrator for the Welfare Plan. Refer to Article 30 for additional contribution related to continuation of benefits.

D Pension Fund

1. Effective May 14, 1992, \$2.65; effective August 1, 1992, \$3.14: effective May 1, 1993, \$3.29; effective May 1, 1994, \$3.69 for each hour earned by each employee shall be forwarded to the Administrator for the Pension Plan.

K Mechanical Contractors Association of Windsor

Trades Benefits Plan

- 1. Employer contributions to all funds shall be in accordance with Schedule A Wage Schedules. Contributions shall be paid monthly by all employers to the Trustees of the Mechanical Contractors Association Trades Benefit Plans for the following funds:
 - 1. The Mechanical Contractors Association of Windsor Industry Fund.
 - 2. The Plumbers Local 552 Welfare Benefit Fund.
 - 3. The Plumbers Local 552 Pension Plan.
 - 4. The Plumbers Local 552 Vacation Pay Trust Fund.
 - 5. The Plumbers Local 552 Training Fund.

Each Employer shall send the required payments and reports to the Administrator of the Mechanical Contractors Association of Windsor Trades Benefit Plans by the 15th day of the Month next following the month for which they are due. Any employer who has not made payments to the Administrator as required by this Agreement on or before the 15th day of the next month, following the month for which they are due, shall have all employees subject to this Agreement withdrawn from the job or shop.

Should any Contractor be found to be in default of remitting payments required to be made pursuant to the terms of this Agreement, and if such default continues for 15 days thereafter, he shall pay to the Trustees, to be distributed to the various funds, interest at the rate of 2% per month (24% per year compounded monthly), or part of, on any unpaid arrears.

2. WELFARE, PENSION AND VACATION PAY

EMPLOYER CONTRIBUTIONS:

Welfare Plan - \$1.80 effective Aug. 1, 1992; \$2.05 effective May 1, 1993; \$2.20 effective May 1, 1994

Pension Plan - \$2.65; \$3.14 effective Aug. 1, 1992; \$3.29 effective May 1, 1993; \$3.69 effective May 1, 1994

Vacation Pay Plan - 10% of basic wage rate

3. The Welfare, Pension and Vacation Pay Plans shall be administered by the Board of Trust-

ees, in accordance with the terms of the Trust Agreement covering these plans. The Board shall be made up of representatives from the Employers and the Union, with three persons being designated by the Employers and three persons being designated by the Union.

- 4. Employers shall make contributions to provide Group Life Insurance, Weekly Indemnity Insurance for lost time due to illness, medical, hospital, pension benefits and any other such benefits, as may be provided by the Trust Agreement together with Vacation Pay.
- 5. Welfare and Pension Contributions and Vacation Pay shall be made monthly to the Trustees of the Funds and remitted to the Administrator. A report showing the names of the employees for whom payments are made and the amount of such payment shall be prepared in quadruplicate and distributed by the employer as follows: The original and two copies to be sent with the remittance to the Administrator. The first copy to be retained by the employer. Although an employer has not employed any person or persons covered by this Agreement and, therefore, not required to make payments hereunder, he shall nevertheless submit a report marked "NIL". See article 6.4 for payment method for Vacation pay.
- 6. An eligible employer shall be defined as:
- a) A member in good standing of an Employers Association.
- b) A Federal, Provincial or Municipal Group.
- c) Any independent contractor or employer engaged in the Plumbing and Pipefitting Industry who has signed a current Agreement.

The agreed upon payments shall be directed to the various funds as may be provided by the Trust Agreement.

7. Welfare and Pension Contributions and Vacation Pay are required for all employees employed under the conditions and Jurisdiction of Local 552 of the United Association.

Welfare and Pension payments shall be made only to provide benefits in accordance with the terms of the Welfare and Pension Plans.

During the term of this Agreement, any increase in wage rates or portion thereof shall be applied to benefits or wages as may be decided by the Union.

In the event an increase or decrease is required to the contributions to the Welfare and Pension Plans, the basic wage rate shall be adjusted in accordance with such increase and/or decrease.

8. "If the contribution PAID BY THE EMPLOYER for any employee benefit be reduced as a result of any legislative or other action, the amount of the saving shall be used to increase other benefits, available to the employee or shall be passed on to the employees in the form of increased wages or salary rates."

Appendix 13 (Ottawa Local 71)

C HEALTH AND WELFARE TRUST FUND

1. Shall be: \$1.32 per hour effective May 14, 1992; \$1.45 effective May 1, 1993; \$1.62 effective May 1, 1994.

Each employer will contribute to the Local Union 71 Health and Welfare Trust Fund the sum above per hour on a regular and overtime hours by each employee covered by the Collective Agreement and will remit said sum to the local 71 Administrator as established under a Declaration of Trust entered on December 10, 1965. Contributions to be made monthly by cheque as per Schedule K.

2. All amounts paid by the Employer to the Health and Welfare Trust Fund shall be in addition

to the hourly wage rates established in this Agreement and in no case shall the Employer deduct any such amounts from the employees' wages.

3. Refer to Standard Article 30 for additional contribution related to continuation of benefits.

D PENSION TRUST FUND

1. Effective May 14, 1992, \$2.70 per hour; effective May 1, 1993, \$3.00 per hour, effective May 1, 1994, \$3.45 per hour.

Again commencing on a date to be established by the Trustees appointed by the Union as hereinafter provided, and in addition to the wages, vacation pay and other benefits, set out in this Collective Agreement, each employer will contribute to the Local Union Pension Trust Fund the sum above for all regular and overtime hours worked by each employee covered by the Collective Agreement to a Trust Fund to be known as "Local Union 71 Pension Trust Fund" which Trust Fund has been established by a Trust Agreement.

- 2. Without limiting the terms of the said Trust Agreement, the purpose and intent of such Agreement shall be to purchase Pension and Supplementary Benefits and such other benefits as the said Trustees shall deem advisable. Provided, however, that all such benefits shall be for the exclusive advantage and benefit of the employees covered by this Collective Agreement.
- 3. The "Committee of Trustees" to administer the said Local Union 71 Pension Trust Fund shall consist of not less than three Trustees all of whom shall be members in good standing of the Union.
- 4. The Trust Agreement above referred to shall establish, among other things, the rules of eligibility for the employees covered by this Collective Agreement and shall further set out and define the duties and responsibilities of the Trustees.
- 5. Payments to the said Local Union 71 Pension Trust Fund shall be made by the employers prior to the 15th day of the month immediately following the month in which the said wages were earned and at no time shall the payments be made to any individual employee.

Payments to the Local Union 71 Pension Trust Fund shall be accompanied by a completed monthly report on a form to be supplied by the said Trustees to administer the said Trust Fund.

6. All amounts paid by the Employer to the Pension Trust Fund shall be in addition to the hourly wage rates established in this Agreement and in no case shall the Employer deduct any such amounts from the employee's wages.

11. The parties agreed on the following statement of facts:

AGREED STATEMENT OF FACTS

- 1. The applicants are U.A. Local Unions which are affiliated bargaining agents of the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("the OPTC"). The OPTC is the designated employee bargaining agency for its affiliated bargaining agents in collective bargaining for a provincial agreement in the industrial, commercial and institutional sector of the construction industry in Ontario with the Mechanical Contractors' Association Ontario ("the MCAO") which is the designated employer bargaining agency:
- 2. The responding parties are employers residing and carrying on business in Ontario who are represented by the MCAO in provincial bargaining and are bound by the current provincial agreement between the OPTC and the MCAO which is effective from May 14th, 1992 until April 30th, 1995 ("the Provincial Agreement"). The Provincial Agreement shall be marked as an exhibit in these proceedings;
- 3. These proceedings arise as a result of the enactment of Bill 138, the *Retail Sales Tax Amendment Act*, on June 23rd, 1994 ("the Act") which is retroactively effective on July 1st, 1993. The

Act effected certain changes to the *Retail Sales Tax Act* and imposed the provincial retail sales tax of 8% ("the RST") on "premiums", as defined by the said Act, paid into multi-employer benefits plans which purchase or provide group insurance benefits. The parties agree that the applicants' welfare funds which are referred to in the applicable appendices to the Provincial Agreement are multi-employer benefits plans for the purposes of the said Act. The grievances filed by the applicants in these proceedings shall be marked as exhibits;

- 4. The Provincial Agreement includes appendices referable to the various geographic zones of each of the OPTC's affiliated U.A. Local Unions, including the applicants. Within each zone, local appendix issues are dealt with under the umbrella of provincial bargaining between the appropriate U.A. Local Union and the local mechanical contractors' association and are subject to the approval of the designated bargaining agencies;
- 5. Each of the appendices to the Provincial Agreement, including the appendices pertaining to the applicants, sets out, *inter alia*, the applicable wage rates, vacation pay and the nature and amounts of employer contributions to be paid to the various employee benefits plans therein referred to;
- 6. Of particular relevance to these proceedings are the provisions requiring employers, including the responding parties, to make contributions to each U.A. Local Union's welfare fund on behalf of their respective employees covered by the Provincial Agreement and to remit such contributions to the Fund's administrator in the hourly monetary amounts, manner and timing as required by such appendices. Each of the said welfare funds constitute funded multi-employer benefits plans to which contributions are made by employers in order for the Fund's trustees to purchase or provide group benefits such as group life insurance, accidental death and dismemberment insurance, etc.;
- 7. During provincial bargaining, the designated bargaining agencies negotiate a total wage package but the employer bargaining agency accepts the allocations of the contributions to the various benefits plans, including, but not limited to the welfare funds of each U.A. Local Union as set forth in the appendices, as directed by the trade union side. This consistent practice extends back, without exception, to the commencement of provincial bargaining in 1978 [subject to relevance];
- 8. When a Provincial Agreement is in force, including the current Provincial Agreement, it is not uncommon for a U.A. Local Union to contact the local mechanical contractors' association with a view to changing the contribution rates of particular benefits plans, including, but not limited to welfare funds. It is a long-standing and established practice that the local associations, with the consent of the MCAO, accept such adjustments in contribution rates without further collective bargaining or are required to accept such adjustments by virtue of provisions to that effect in the applicable appendices. Thus, for example, should a U.A. Local Union contact a local contractors' association to request a reduction or increase in the contributions to a particular benefits plan by increasing or decreasing the contribution to another of the benefits plans or the base wage rates, the local association will, as a matter of contractual obligation or practice, make such adjustments and do so with the consent of the MCAO, if necessary, provided that the overall wage package remains unchanged [subject to relevance];
- 9. These grievances are designed by the applicants to enforce the provisions of the Provincial Agreement and of the Act on the responding parties by seeking to collect the 8% RST on the contributions remitted by them to the applicants' welfare funds. The responding parties have paid the hourly amounts of the contributions as set forth in the appendices to the Provincial Agreement. Without any admission as to the amounts of the damages, the responding parties admit that they have not paid the aforesaid 8% in addition to such contributions, as alleged in the grievances. In addition to challenging the arbitrability of the grievances, the responding parties take the position that their payments of the set amounts of contributions to the welfare funds referred to in the appendices include and satisfy their obligations, if any, to pay RST in respect of such contributions. By way of example, if an appendix in the Provincial Agreement requires a contribution of \$2 per hour to a particular welfare fund, the responding parties submit that, by paying the \$2, \$1.85 is being paid by them in contributions and 15 in tax (\$2 x 8/108) while the applicants submit that \$2.16 per hour must be paid, that is, \$2 in contributions and additional 16 for RST.

- 10. The position of the Ministry of Finance, which administers the Act, on the payment of RST on contributions to multi-employer benefits plans is set forth in its memorandum to administrators/trustees/employers/union s dated March 24th, 1995. The said letter shall be marked as an exhibit in these proceedings subject to its relevance or appropriateness;
- 11. The O.L.R.B. shall remain seized as to the quantum of damages including penalties and interest and the parties reserve their rights to call evidence relating thereto;
- 12. This statement shall constitute a complete summary of the facts necessary to adjudicate the grievances in these matters and, subject to para. 11, *supra*, no further evidence will be called or filed by either of the parties without the consent of the other party or by leave of the Board. This statement is prepared solely for the purposes of these proceedings and will not be referred to in any other proceedings.

Submissions

12. The parties relied on the following cases:

Re Denison Mines Ltd. and United Steelworkers, (1982), 5. L.A.C. (3d) 19 (Adams)

The City of Thunder Bay, unreported arbitration award dated September 29th, 1989 (Burkett)

Re Rothmans, Benson & Hedges Inc. and Bakery, Confectionery & Tobacco Workers' Union, Local 325-T. (1990), 10 L.A.C. (4th) 18 (Brown)

Halton Forming Ltd., [1990] OLRB Rep. May 553

Hamilton Harbour Commissioners, et al and International Longshoremen's Association Locals 1654 and 1879, unreported decision of arbitrator W.B. Rayner dated 20th August, 1990

Re Beer Precast Concrete Ltd. and Labourers' International Union, Local 506, (1990), 16 L.A.C. (4th) 37 (Charney)

Ontario Legal Aid Plan v. Ontario Public Service Employees Union, (1991), 6 O.R. (3d) 481 (Ont. C.A.)

Re The Crown in Right of Ontario (Ministry of Health) and Ontario Public Service Employees' Union (Martin), (1993) 31 L.A.C. (4th) 129 (White)

Ontario Nurses' Association v. Etobicoke General Hospital, (1993) 94 CLLC ¶17,017

Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79, (1993) 35 L.A.C. (4th) 357 (Fisher)

Re 442952 Ontario Inc. (Bourget Nursing Home Division) and United Steelworkers of America, (1993), 35 L.A.C. (4th) 345 (Bendel)

Re Canadian Automobile Association, Ottawa (Ontario Motor League) and Retail, Wholesale & Department Store Union, Local 414, (1993), 36 L.A.C. (4th) 322 (Dumoulin)

Kitchener-Waterloo Ambulance (1987) Inc. and Canadian Union of Public Employees, Local 791, (1993) 36 L.A.C. (4th) 1 (Mikus)

Re Placer Dome Inc. (Detour Lake Mine) and United Steelworkers of America, Local 9171, (1993) 39 L.A.C. (4th) 54 (Simmons)

Spencer Construction Company Ltd., [1994] OLRB Rep. Feb. 181

Re Toronto Electric Commissioners and Canadian Union of Public Employees, Local 1, (1994) 41 L.A.C. (4th) 80 (Schiff)

Corporation of the Town of Arnprior and International Union of Operating Engineers, Local 793 (1991), 22 L.A.C. (4th) 80 (Bendel)

Kirkland & District Hospital and Service Employees' Union, Local 478 (1988), 34 L.A.C. (3d) 385 (Weatherill)

Ford Motor Co. of Canada Ltd. and Canadian Automobile Workers, Local 1520 (1992), 27 L.A.C. (4th) 257 (Palmer)

Molson's Brewery (Ontario) Ltd. and Canadian Union of United Brewery Workers, Local 304 (1978), 17 L.A.C. (2d) 354 (Curtis)

Cominco Ltd. and United Steelworkers, Local 480 (1986), 26 L.A.C. (3d) 279 (Larson)

BBM and Howden & Parsons (Canada) Ltd. (1970), 21 L.A.C. 177 (Weiler)

Labourers' International Union of North America, Local 183 v. Bairrada Masonry Inc., [1994] OLRB Rep. March 204

Re Dupont Canada Inc. and Nylon Workers Union (1994), 40 L.A.C. (4th) 203 (Starkman)

Fieguth v. Acklands Ltd., (1989) 59 D.L.R. (4th) 114 (McEachern)

Canterra Energy Ltd. v. Her Majesty The Queen, (1985) DTC 5245 (Reed)

Canterra Energy Ltd. (formerly Aquitaine Company of Canada Ltd.) v. Her Majesty The Queen, (1987) DTC 5019

Gene A. Nowegijick v. Her Majesty The Queen, [1983] 1 S.C.R. 29 (Dickson)

Hartland v. Diggines, (1926) A.C. 289 (Atkinson)

Submissions in Respect of Jurisdiction

- 13. As earlier noted, the responding parties assert that the Board is without jurisdiction to entertain this grievance. They take the position that the Board in hearing this matter and granting the remedy sought would be enforcing a tax statute. A tax statute is not, in their view, a statute to which section 45(8)(3) of the Act would apply. A tax statute is not an employment related statute like the Human Rights Code, R.S.O. 1990, c.h. 19. In any event, the responding parties submitted, even if the Board were to find that the R.S.T.A. was an employment related statute, this grievance is based on the Board stepping into the shoes of an adjudicator under the R.S.T.A. and consequently the Board would be enforcing the statute rather then interpreting and applying it. (See: Spencer Construction Company Ltd., supra; Re Toronto Electric Commissioners and Canadian Union of Public Employees, supra; Re Dupont Canada Inc. and Nylon Workers Union, supra, and other cases in this regard.)
- 14. Further, the responding parties argue that since, in their view, section 45(8)(3) of the Act does not apply to this type of statute, the arbitrator can only apply and interpret the statute in question within the confines of the *McLeod v. Egan* test. It is the view of the responding parties that the arbitrator can only impose the statutory tax scheme in situations where there is specific collective agreement language allowing the arbitrator to do so or where there is a conflict between the collective agreement and the statute. In counsel's view, there is neither a conflict between the collective agreement and the statutory language of the R.S.T.A., nor specific language in the collective agreement that would allow enforcement. In counsel's view the scheme of the R.S.T.A. does not properly deem a specific amount to be collected pursuant to the Provincial Collective

Agreement, and consequently any monies tendered pursuant to the Provincial Collective Agreement could not include an exact amount (sum certain) that must be remitted to the tax authorities.

- 15. In the fact situation before the Board, (see: paragraph 11 above at page 18 of the agreed statement of facts) a hypothetical amount of \$2.00 per hour is tendered as a contribution from the employer to one of the various funds. The responding parties assert that since the statute does not characterize a specific sum to be remitted to the tax authorities the arbitrator is in fact enforcing the statute rather then examining and reconciling the collective agreement with the statute. (see: Corporation of the Town of Arnprior and International Union of Operating Engineers Local 793, supra) For the arbitrator to interpret and apply this type of statute, the statute in question must have a deeming provision (see: section 182 of the Excise Tax Act, supra). An arbitrator cannot enforce the tax collection scheme found in this type of statute through the collective agreement. In counsel's view, only where a statute specifically deems an amount to be deducted, and that amount is in conflict with provisions of the collective agreement, can an arbitrator direct a party to pay that amount within the collective agreement framework.
- Counsel for the applicant submits that the R.S.T.A. creates an obligation on the employer as a planholder to pay the tax. In counsel's view the issue is one of interpreting the collective agreement. The adjudicator must find, on the collective agreement language, whether or not the employers contributions to the multi-employer funds are inclusive or exclusive of the 8% tax. In counsel's view, any reliance on the statute by the adjudicator is squarely within the McLeod v. Egan test. Counsel took the position that the legislature has deemed the specific amount payable through the regulation making power. Specifically, in counsel's view, Ontario Regulation 201\95 and Ontario Regulation 165\95 create a deeming provision which advises the vendors, the trustees of the various multi-employer insurance funds, (see: definition of vendor in section 1 of the R.S.T.A.) to collect from the employers, who are the planholders and consequently the purchasers, (see: section 2.1 (15); 2.1 (13)(a), the definition of planholder and the definition of premium in clause (e) of section 1 of the R.S.T.A.) an amount which is calculated by multiplying the contribution paid by 8/108. The amount collected would be a specific amount which would then be viewed as either included or excluded in the employer contribution depending on the language of the collective agreement. In applicant counsel's view the issue is one which is squarely within the ambit of the adjudicator's role pursuant to the collective agreement. Counsel submits that the employer has an obligation to pay or remit the tax and that obligation falls squarely within the collective agreement.
- 17. In the alternative, counsel for the applicant asserts that the R.S.T.A. is an employment related statute, like the *Human Rights Code*, and therefore, pursuant to section 45(8)(3) of the Act, the Board has jurisdiction to apply and interpret the R.S.T.A. when it is construing the collective agreement. Counsel submits that the *Human Rights Code* only deals in part with employment issues. The *Human Rights Code* deals with discrimination issues relating to many areas of societal interaction outside the employment relationship. Counsel asserts that, like the *Human Rights Code*, the R.S.T.A. deals with the employment relationship as part of its mandate and consequently, for the purposes of section 45(8)(3) the Board should find the R.S.T.A. to be an employment related statute.

Submissions on the Merits of the Grievances

18. Counsel for the applicant argues that this situation is no different then the impact of the Employer Health Tax ("E.H.T.") on the collective agreement bargaining structure. (See: Halton Forming Ltd., supra; Hamilton Harbour Commissioners., supra; and Re Beer Precast Concrete

Ltd., supra). In counsel's view the change of the statute and its impact on the parties is a risk of the collective bargaining process.

- 19. Counsel for the applicant asserts that the statute is a tax on contributions. There is a set amount for the cost of the contribution in the Provincial Collective Agreement. At the same time the contribution is payable by the employer to the fund, the tax becomes payable. (See section 11 of the R.S.T.A.) The statute imposes an obligation on the trustees of the funds to collect the tax from the employers at the time the premium (in this case contribution) is remitted by the employer to the trust funds. (See: section 11, 13 and 15 of the R.S.T.A.). Consequently, in counsel's submission, the breach of the Provincial Collective Agreement is occasioned when the employer remits an amount exclusive of the tax. The employer, in taking the position that the amount tendered is inclusive of the tax, is in effect saying that the contributions made pursuant to the Provincial Collective Agreement are to be applied to more then benefits and the administration of the various funds. They are in effect being applied to statutory obligations that fall squarely on the employers.
- 20. Counsel for the applicant asserts that the statutory scheme places the trust funds in the position of collecting and then remitting the tax to the tax authorities. (see: sections 19 and 22 of the R.S.T.A.) This obligation creates a short fall in the amount tendered by the employers in that they tender the hypothetical \$2.00 rather then an amount of \$2.16.
- Counsel for the responding parties assert that the amount tendered pursuant to the Provincial Collective Agreement is tax inclusive. This Provincial Collective Agreement does not require employers to provide a specific level of benefit. In counsel's view the Provincial Collective Agreement establishes an amount to be paid for all costs associated with providing benefits to the employees. Counsel asserts that it would be unfair to encumber the employer with an amount of money that was not contemplated by the Provincial Collective Agreement.
- This collective bargaining regime has, submits responding parties' counsel, allowed the union to apply part of the total wage package to the under funding of any benefits contemplated by the various plans. In effect when a benefit has cost more then expected, for example, because of a bad rating experience, the union has been able to, either by practice or by an elevator clause in the various appendices, redistribute part of the overall wage package to the benefit contributions. The union has flexibility to apply portions of the wage or pension remittances to the benefit plan unilaterally. Counsel for the responding party argues that this tax is part of the overall cost of providing benefits and consequently the unions should fund the tax through the overall wage package. This would be consistent with the way risk allocation has been treated in respect of the rising cost of any of the various benefits within the context of the funds administration.
- This Provincial Collective Agreement, in responding parties' counsel's view, supports the concept of risk allocation. Article 30 of the Provincial Collective Agreement is a specific article which deals with the increased cost to multi-employer funds in respect of continuing to provide injured workers with benefits, under the multi-employer plan, for a period of one year. The Workers Compensation Act allocated a financial risk to the multi-employer plans, by assuring the continuation of benefit coverage to injured workers, and the Provincial Collective Agreement, through article 30, redistributed that risk. Counsel asserts that absent a provision like article 30, the employer is not responsible for any part of the tax. For the employer to be responsible, the collective agreement would have to contain language like that found in article 30. Absent specific language in the collective agreement allocating the risk to the employer, in respect of the tax, the amounts remitted to the union are inclusive of the tax.
- 24. The E.H.T., asserts the employer, is different then the R.S.T.A.. The E.H.T. was a tax of general application. The R.S.T.A. is directed only at employers who pay premiums in respect of

insurance. Specifically, in respect of multi-employer plans, employers who pay contributions to the union's trust funds. The employers response to the EHT was to attempt to reduce the amount of contribution to the various funds because the funds no longer had the responsibility of paying for OHIP. In respect of the R.S.T.A., the employers are not attempting to reduce the amount of the contribution under the collective agreement but rather are paying the full amount of contribution negotiated in the collective agreement which they view as tax inclusive.

25. Counsel for the responding parties distinguishes the case *Re Kitchener-Waterloo Ambulance*, *supra*, from the case before us. In *Re Kitchener-Waterloo Ambulance*, *supra*, an employer deducted the cost of the retail sales tax from individual members of the bargaining unit. The arbitration board held that the retail sales tax does not alter the employer's obligation to pay the full cost of the premiums. Counsel for the responding parties argues that in his view the collective agreement in the above noted case included a specific obligation on the employer to pay the full cost of the premiums. This obligation does not, in his view, exist in the case before us. Further, the case does not deal with the impact of the R.S.T.A. on multi-employer plans. In respect of this collective agreement, the contribution tendered is the total amount that the employer is supposed to tender. In counsel's view this amount includes the tax.

Decision

- 26. The Board finds that it has jurisdiction to decide this matter, since the Board's decision is based upon an interpretation of the Provincial Collective Agreement. In our view the issue is whether the amounts remitted by the employer as contributions to the various trust funds are amounts which comply with the requirements of the Provincial Collective Agreement.
- 27. The responding parties are employers residing and carrying on business in Ontario and are represented by the M.C.A.O., the designated employer bargaining agency. In that capacity, the M.C.A.O. represents the responding parties in provincial bargaining. The responding parties are bound to the current provincial agreement between the Pipe Trades and the M.C.A.O. which is effective from May 14, 1992 to April 30,1995. The R.S.T.A. was amended by Bill 138, and was given Royal Assent on June 23, 1994. The change to the legislation was effected *after* the parties had entered into their present collective agreement.
- 28. The parties agree, for the purpose of the adjudication before this Board, that the legislation places a tax obligation on the employer. The trustees of the benefit plan are the "vendors" as defined by the R.S.T.A.. This statutorily enforced transaction, is completed at the exact moment that contributions are remitted to the multi-employer funds.
- Each local union has negotiated, within the context of the Provincial Collective Agreement, local appendices. Each local appendix contains articles which pertain to a geographic area that is within the administrative jurisdiction of a local union. These grievances pertain specifically to the local appendices of Local 800 (Sudbury), Local 71 (Ottawa), Local 552 (Windsor) and Local 628 (Thunder Bay). Each Local Union and local Contractors Association has negotiated slightly different language, relating to clauses, in respect of local issues. These clauses include language in respect of benefits and the administration of the overall wage package.
- 30. Each of the local appendices has different wording to deal with the issue of benefits. At a minimum, each of the local appendices places an obligation on the employer to contribute to the union's benefit plan on the basis of hours worked by the employee. (See: Appendix 1 (c); Appendix 3 (C & D); Appendix 4 (C) & (K)(2); Appendix 13 (C)) These payments are to be made to the Fund and the Fund is to administer the money for the purpose of providing benefits to the members of the Local unions. (See: paragraph 6 of the agreed statement of facts)

- The parties have agreed, in paragraph 7 and 8 of the agreed statement of facts, that as long as the total wages package remains the same, the union may request a change to the contribution rates for specific benefits, and both the local associations and the M.C.A.O. accepts these changes to the amounts of the contributions. Should the costs of a certain benefit, (for example, dental insurance) increase, the local union may use some of the wage or pension contribution to make up the shortfall in the cost of the dental benefit, and it does so by requesting that the employers reallocate funds within the total wage package to allow for increased contributions to the dental plan. In this fashion, the trustees of the various plans have through the local unions the ability to be flexible, and to ensure that an adequate level of benefits are maintained.
- 32. The practice and the language of the Provincial Collective Agreement allow the union to reallocate funds within the total wage package as a means to make up a shortfall in the trust funds administration, where, for example, the negotiated contribution rate is not sufficient to meet the financial requirements necessary to continue to properly fund negotiated benefits.
- The R.S.T.A. creates an obligation on the employer to pay an 8% tax at the same time that employer makes a contribution to the fund. (See section 11 of the R.S.T.A.) By operation of law, part of any remittance or payment to the fund is deemed to include the tax owed. For example, if the employer remits only \$2.00, this amount is tax inclusive. Again, because of the effect of the R.S.T.A., only \$1.85 of this \$2.00 would be a contribution towards benefits and administration of the funds and \$0.15 would by statute be the retail sales tax owed. (See paragraph 8 of the Agreed Statement of Facts) The amounts remitted are in the complete control of the employer. Thus, if the Provincial Collective Agreement calls for a payment of \$2.00 towards or for benefits, and the employer remits only the \$2.00, then (since the effective date of the R.S.T.A. amendments) only \$1.85 will in fact be *contributed* to the funds, even though \$2.00 is being remitted. On this example, there will be a shortfall in the amount to be contributed of \$.15.
- 34. The employer submits that the fund itself assumes the obligation of this \$0.15 shortfall. This can be remedied, on the employer's analysis, by redistributing a portion of the overall wage package to the fund. In effect, if the employer is correct, its obligation is discharged by passing the tax obligation through to the fund and the employees. However, there is nothing in the Provincial Collective Agreement permitting such a "pass through".
- 35. In *Halton Forming Ltd.*, *supra*, the Board found that employers could not reduce payments made pursuant to the collective agreement to the health trust fund because of the enactment of the E.H.T.. The employers were found to have an obligation to pay the amount negotiated to provide benefits under the collective agreement. The amount negotiated in the collective agreement could not be reduced because the statute had reduced the fund's cost in respect of buying a particular benefit. At paragraph 10 the Board said the following:
 - "10. When bargaining a collective agreement, an employer takes into account its current and expected costs of doing business and a trade union takes into account the current and expected costs of living and working of the employees it represents. Once agreement is reached, ensuing economic and social changes may create differences between expected and actual costs of doing business and costs of living and working. Changes in income taxes and other taxes may and often do have that effect, as may changes in government economic and social programs. The bargain the parties make must nevertheless stand for a period of time before either party can require the other to renegotiate it. The parties to collective agreements generally do not agree that an arbitrator or arbitration board can adjust their agreement in mid-term to redress externally induced changes in the parties' economic circumstances."
- In the Board's view, the case at hand is similar in nature to the E.H.T. case. The parties negotiated an amount to be tendered as a *contribution* to the trust fund. Reference to the provi-

sions of Appendix I of the Provincial Collective Agreement demonstrate this. The parties agreed that the employer (or contractor) was to "contribute" specified amounts (subject, as noted above, to reallocation within the total wage package). The requirement in the agreement is not merely to remit a certain sum, but to contribute a certain sum. The intention is clearly to ensure that the specified sum is actually utilized for the funds.

- 37. This interpretation reflects the words used in the Provincial Collective Agreement (the agreement refers to "contributes" or "contributions"). As well, the Board is satisfied that the intention of the parties was that the amounts remitted be utilized for the plans or funds. Looking at all the relevant remittance provisions demonstrates this intention quite apart from the use of the specific word "contribute". The amounts in question were to go for the benefit of the employees. The nature of benefit plans, and the requirement that they be properly funded to enable them to continue to provide benefits, the language used to describe the payments, and the practice of allowing reallocations to ensure the plans remain fully funded, all reflect the intention that the remitted amounts were to go to the plans, for the continuation of benefits under the various funds.
- 38. During the currency of the Provincial Collective Agreement the legislature enacted a statute which places an obligation on employers to pay a certain amount in tax. The employers, by tendering a tax inclusive amount, have attempted to shift the tax obligation from themselves to the funds by remitting (for example) \$1.85 for benefits and \$0.15 for the tax, and in so doing have not met their obligations under the Provincial Collective Agreement. The *contribution* rate was supposed to be (for example) \$2.00 for benefits. The statute does not override the Provincial Collective Agreement obligation to contribute certain amounts; rather, it makes the employer responsible and liable for paying the tax. In the absence of a statutory override, the employer must continue to pay to the funds as required by the Provincial Collective Agreement.
- 39. Article 30 of the Provincial Collective Agreement is an example of how the parties have, through the collective bargaining regime, dealt with a statutory financial obligation on a trust fund. The *Workers Compensation Act* created an obligation on multi-employer plans to keep injured workers in benefits for a period of one year. In response to this legislative initiative, the parties negotiated a \$0.03 an hour employer contribution (Article 30). This article helps the trust funds to discharge their obligations under the statute. The legislation is clear that the multi-employer plan would be responsible for maintaining the coverage of the injured worker if this Article did not exist.
- 40. In the Board's view, the employer must honour its collective agreement obligations absent statutory language to the contrary. Here, the Provincial Collective Agreement requires contributions in certain amounts, and the effect of the R.S.T.A. is to treat part of the amount forwarded to the funds as tax, thus reducing the amount of the remittance that is a contribution to the fund. This is in breach of the Provincial Collective Agreement. The employer cannot re-characterize the meaning of "contribution" by maintaining that the amount of money remitted is the same as the amount "contributed", where the R.S.T.A. has placed a statutory financial obligation upon the employer. Re-characterizing the meaning of "contribution" to include the tax would in effect rewrite the collective agreement, in the absence of any consent to do so or any statutory enactment to that effect.
- 41. In *Kitchener-Waterloo Ambulance*, *supra*, the collective agreement placed an obligation on the employer to pay all premium increases that occur during the collective agreement. As well the statute created an obligation on the plan holder to pay the retail sales tax. The arbitrator ruled that the employer was responsible for all premium increases and for the full amount of the tax. Here the employer makes contributions to a multi-employer plan. The amount of the contribution

is negotiated by the parties and represents an amount which the trustees of the plan will use to discharge their obligations pursuant to the trust. In short they are required to provide benefits for members of the plan. Like in the fact scenario in *Kitchener-Waterloo Ambulance*, *supra*, the employer here is obligated to pay the tax pursuant to the statute. The contributions to the benefit funds required under the collective agreement are part of the employees' overall wage package. These contributions do not include funding obligations that the employer is statutorily responsible for. Like the employer in *Kitchener-Waterloo Ambulance*, *supra*, these employers are responsible for the R.S.T.A., and cannot rely on monies tendered to the benefit fund to fulfil their statutory obligation. The statutory obligations pursuant to R.S.T.A. is an obligation which is outside the Provincial Collective Agreement, in the sense that the Provincial Collective Agreement does not provide a right to or mechanism for set off of the tax, or reallocation of it to the detriment of the employees, nor does the R.S.T.A. render the union or employees liable for the tax.

- 42. In conclusion, the Board declares that the responding parties have violated the Provincial Collective Agreement in that they failed to contribute the appropriate amounts to the various Benefit Funds in that the amounts set out in the Provincial Collective Agreement are amounts to be contributed to the funds, and are therefore amounts exclusive of retail sales tax.
- 43. The Board remains seized of any matter that arises in respect of this decision.

3113-94-EP Allan Duxbury, Applicant v. Vaillancourt Construction Limited, Emile A. Vaillancourt (Senior), Rejean Carriere, Responding Parties

Discharge - Employee - Environmental Protection Act - Board dismissing allegation that employer violating section 174(2) of Environmental Protection Act (EPA) by failing to recall applicant to work in March 1994 following lay-off in November 1993 - Board finding that employer intended November 1993 lay-off to be permanent and that subsequent reprisal against applicant made when applicant no longer employee - In contrast to prohibition against reprisals contained in Labour Relations Act and Occupational Health and Safety Act, protection against reprisals in EPA applying only to "employees" - Application dismissed

BEFORE: Kevin Whitaker, Vice-Chair.

APPEARANCES: Ramani Nadarajah and Nancy Johnson for the applicant; Hervé Sauvé, Q.C. for the responding parties.

DECISION OF THE BOARD; July 4, 1995

- 1. This is an application under section 174 of the *Environmental Protection Act* (referred to in this decision as the "EPA"). The applicant claims to have suffered from a reprisal, committed by the respondents. The respondents deny the reprisal. In the alternative they argue that even if there was a reprisal, it was not one which gave rise to a breach of the EPA.
- 2. The respondents Vaillancourt Construction Limited ("Vaillancourt") and Rejean Carriere ("Carriere") were charged and convicted of a number of offences under the EPA. All offences related to disposing of waste in a manner prohibited by the EPA. The substance of the applicant's case is that the respondents failed to recall him from layoff because of the fact that he assisted in

investigations which lead to the convictions. The respondents say that the applicant was permanently laid off well before they had any knowledge of his involvement in the investigations. For reasons that follow, I agree with the employer and the application is dismissed.

- 3. The respondents also argued that the Board should not proceed to inquire into the application because of the delay between the occurrences which gave rise to the complaint in March of 1994 and the date of application in November of 1994. As the application has been dismissed on the merits, it is not necessary to decide the issue of delay. The applicant did not object to the respondent proceeding with the delay argument despite the fact that it had not been pleaded. Accordingly, the Board directed that evidence on the issue of delay be called with evidence on the merits. Despite their objection, the respondents were directed to proceed first with their evidence.
- 4. Section 174 of the EPA permits an employee to file a complaint with the Board alleging an employer reprisal against the employee for having acted in accordance with that Act. Similar to section 91.5 of the *Labour Relations Act* (the "Act"), section 174(10) creates an evidentiary burden that the employer must displace to prove that the impugned conduct does not contravene the legislation. The relevant provisions of section 174 of the EPA for purposes of this case are as follows:

174.-(1) In this section, "Board" means the Ontario Labour Relations Board.

- (2) No employer shall,
- (a) dismiss an employee;
- (b) discipline an employee;
- (c) penalize an employee; or
- (d) coerce or intimidate or attempt to coerce or intimidate an employee,

because the employee has complied or may comply with,

- (e) the Environmental Assessment Act;
- (f) the Environmental Protection Act;
- (g) the Fisheries Act (Canada);
- (h) the Ontario Water Resources Act; or
- (i) the Pesticides Act,

or a regulation under one of those Acts or an order, term or condition, certificate of approval, licence, permit or direction under one of those Acts or because the employee has sought or may seek the enforcement of one of those Acts or a regulation under one of those Acts or has given or may give information to the Ministry or a provincial officer or has been or may be called upon to testify in a proceeding related to one of those Acts or a regulation under one of those Acts.

- (3) A person complaining of a contravention of subsection (2) may file the complaint in writing with the Board.
- (4) Where a complaint is filed in writing with the Board,

- the Board may authorize a labour relations officer to inquire into the complaint; or
- (b) the Board may inquire into the complaint.
- (5) A labour relations officer who is authorized to inquire into the complaint shall make an inquiry forthwith and shall endeavour to effect a settlement of the matter complained of and shall report the results of the inquiry and endeavours to the Board.
- (6) Where the labour relations officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint.
- (7) Where the Board inquires into the complaint and is satisfied that an employer has contravened subsection (2), the Board shall determine what, if anything, the employer shall do or refrain from doing with respect thereto.
- (8) A determination under subsection (7) may include, but is not limited to, one or more of,
 - an order directing the employer to cease doing the act or acts complained of;
 - (b) an order directing the employer to rectify the act or acts complained of; or
 - (c) an order directing the employer to reinstate in employment the complainant, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer.
- (9) A determination by the Board under subsection (7) applies despite a provision of an agreement. (10) On an inquiry under this section, the burden of proof that an employer did not contravene subsection (2) lies upon the employer.

. . .

- (14) The Labour Relations Act and the regulations under that Act apply with necessary modifications in respect of a proceeding under subsections (2) to (13).
- (15) For the purposes of subsections (2) to (14), an act mentioned in subsection (2) that is performed on behalf of an employer shall be deemed to be the act of the employer.
- The protection from employer reprisals in the EPA applies to persons who are "employees". This is in contrast to the type of protection extended to a broader category of complainant described as "persons" in section 67 of the *Labour Relations Act*. The term "employee" in the EPA is also different from the category of complainant to which similar protection is extended under section 50(1) of the *Occupational Health and Safety Act* (the "OHSA"). Under the OHSA, the category of complainant is described as "worker" which is a defined term under that legislation. The relevance of the language in the EPA is that the respondents in this case took the position that the applicant was permanently laid off at the time that the alleged reprisals took place. Even if there were acts of reprisals which are not admitted, the respondents argued that the protection of section 174 cannot be read to extend to persons who are seeking to be rehired. Put plainly, the respondents argued that the applicant was not an employee at the time of the alleged reprisals. The applicant argued that although he was laid off, an employment relationship continued despite the lack of active employment.

The Facts of the Case

6. There are three respondents. The respondent Vaillancourt Construction Limited ("Vaillancourt") operates amongst other undertakings, a gravel pit outside of Sudbury. The com-

pany is owned by the respondent Emile A. Vaillancourt. The respondent Carriere is the foreman of the gravel pit. In this position, he acts as the most senior manager on site.

- 7. The applicant was hired by Vaillancourt as a loader operator in April of 1991. Vaillaincourt was aware at the time of hiring that the applicant was experienced as a loader operator. Prior to his hiring by the respondent, the applicant was employed by a company that operated "across the road" from Vaillancourt. He worked there as a loader operator and truck driver. From the outset, the applicant worked for the respondent company as a loader operator. This continued until his last day of work in November of 1993.
- 8. While employed by Vaillancourt, the applicant was laid off on three occasions. The applicant filed as an exhibit a complete package of all pay stubs received by him during his employment with Vaillancourt. A review of those documents reveals the following periods of active employment:

April 14, 1991 to December 6, 1991 January 9, 1992 to December 9, 1992 January 6, 1993 to November 9, 1993.

- 9. The pay stubs for the periods ending December 23, 1991 and January 6, 1993 both indicate that the applicant was paid for 3 statutory holidays, those being Christmas Day, Boxing Day and New Years Day. All three statutory holidays fall within the two periods where there was no active employment.
- 10. There is some dispute between the parties as to the applicant's last day of work. It is undisputed that the last day of work was in November 1993, and that the applicant left the work site early on his last day.
- 11. The applicant stated that he was laid off due to a shortage of work. Mr. Carriere testified that the applicant was laid off because the employer had formed the view that he was difficult to get along with and "hard on the equipment". It is undisputed that at the point of lay off, the applicant was not told that he was being dismissed for cause. Prior to his layoff the applicant had never been counselled or disciplined.
- 12. The applicant's record of employment reflects that the layoff occurred due to shortage of work. The applicant claimed to have received similar records of employment when laid off on the two earlier occasions. He was unable to produce these documents when cross examined on this point. Under the heading "expected date of return" in box "20" of the record of employment, the employer did not indicate anything. The form provides three categories which may be checked off. Those categories are "expected date of recall", "not returning" and "date unknown". Carriere testified that the form was filled out in this manner so as to permit the applicant to qualify for unemployment insurance benefits. Carriere was clear that, at the point of layoff, he had no intention of recalling the applicant.
- 13. Upon layoff in November 1993 the applicant was replaced on the equipment that he had been operating by Chris Bangs. Mr. Bangs testified at the hearing as a witness called by the respondent. Mr. Bangs had more seniority than the applicant, but less experience operating the particular types of equipment that were operated by the applicant.
- 14. On December 13, 1993, the applicant provided a statement to Nancy Johnson, an enforcement officer with the Ministry of the Environment (the "MOE"). In his statement, the

applicant indicated that, acting on instructions from Carriere, he had buried waste on the premises of Vaillancourt in contravention of the EPA.

- 15. On February 18, 1994, Vaillancourt and Carriere were served with a notice by the MOE indicating that the Ministry would be proceeding with charges against them under the EPA. The notice did not disclose the fact that the applicant had provided a statement to the MOE which would form the basis of the prosecution.
- 16. On March 8, 1994 or thereabouts, the applicant went to his old workplace to find out if there was any work for him. To that date he had not been recalled by Vaillancourt. The applicant spoke to Carriere. The applicant was told by Carriere that he didn't know if there would be work. It was undisputed that Carriere appeared to evade the applicant so as to avoid any conversation. Eventually, the applicant left not knowing if he would be recalled to work.
- 17. By letter dated March 17, 1995, from Dennis Quong, Counsel with MOE, to Mr. Sauvé, solicitor for the respondents, the Ministry provided the respondents with a disclosure brief of the case for the Crown with respect to the charges under the EPA. Included in the disclosure brief was the witness statement made by the applicant and referred to in paragraph 14 above.
- 18. On March 28, 1994, the applicant again went to the respondents' work site to find out if there was any work for him. He was unsuccessful in speaking directly to Carriere about whether he would be recalled to work. He did however, have a conversation with the respondent Emile Vaillancourt. After exchanging greetings, Mr. Vaillancourt asked the applicant why he had told the Ministry that he had buried full oil tanks. The applicant asked Mr. Vaillancourt if there would be work for him. It is undisputed that Mr. Vaillancourt told him that it would depend on what happened when the Court case came up.
- 19. On March 29, 1994, the applicant went to see Nancy Johnson, the MOE enforcement officer who had taken his statement in December of 1993. His purpose in seeing her was to obtain assistance in dealing with what he thought to be a reprisal by the respondents for having provided a statement to the MOE. The applicant provided a written statement to Nancy Johnson describing the events and conversations that occurred during his two visits to the respondents' work site in March of 1995.
- 20. On November 22, 1994, Vaillancourt and Carriere pleaded guilty to charges under the EPA. Both respondents were fined and Vaillancourt was obliged to carry out certain tasks as part of the Court's Order.
- 21. The applicant was subpoenaed to Court on November 22, 1995. As a result of the guilty pleas, he was not obliged to testify.
- 22. On November 23, 1994, the applicant went to see Nancy Johnson. She assisted him in drafting his application. The application was dated on November 25, 1995 and received by the Board on November 30, 1995.

The Decision

23. The issue to be determined is whether the respondents dealt with the applicant in a manner which contravenes section 174(2) of the EPA. The specific allegation is that in failing to recall him to work in March of 1994, the respondents either dismissed, disciplined, penalized, coerced or intimidated the applicant contrary to section 174(2) of the EPA.

- 24. Section 174 of the EPA prohibits an employer from committing reprisals against an *employee*, for having assisted in a prosecution under that legislation. It is agreed between the parties that the protection of the section extends only to those persons who have the status of "employee" at the time of the alleged act of reprisal. The threshold factual question then is whether the applicant's employment relationship with the respondent Vaillancourt Construction Limited ended in November of 1993. The applicant argued that he was an employee in March of 1994 when he had his discussion with Mr. Vaillancourt. The respondents took the position that the the employment relationship was terminated in November 1993 when the applicant was laid off. The respondents argued that it would not matter what was said or done to the applicant by the respondents in March of 1994. Regardless of the respondents' conduct, the applicant could not claim the protection of section 174(2) if his employment relationship had ended months before.
- 25. The applicant argued that in each year of his employment, he would be laid off around the end of the calendar year and recalled in the new year. In his submission, each year, the seasonal layoff would occur because of a shortage of work. When the work picked up in the new year, he would be recalled. He asserted that the layoff in November of 1993 was no different from what happened in preceding years. According to the applicant, there was a subsisting employment relationship that extended from November 1993 through to March of 1994 despite the fact that he was not recalled to active employment.
- 26. The respondents took the position that the layoff in November of 1993 was different from the two earlier periods during which the applicant had been laid off. The respondents argued that he was permanently laid off in November of 1993 because they harboured significant concerns about his performance on the job.
- 27. Section 174(10) of the EPA places an evidentiary onus on the respondent employer to show that it did not contravene section 174(2) of the legislation. This is similar to the provisions of section 91(5) of the Labour Relations Act and section 50(5) of the OHSA. Both pieces of legislation are administered by the Board. The applicant referred to Bakelite Thermosets Limited [1990] OLRB Rep. Jan. 3. This case dealt with what was then section 134b of the EPA. The provisions of section 174 of the EPA are identical to the then provisions of section 134b. In Bakelite, supra, the applicant alleged that he had been discharged because he was seeking enforcement of the EPA. At paragraphs 30 and 31 of the decision, the Board noted:
 - 30. Our inquiry under section 134b of the Environmental Protection Act focuses on the reasons for Mohindra's discharge. In this sense it is not dissimilar from the Board's inquiry pursuant to section 24(1) of the Occupational Health and Safety Act. The issue that the Board must decide is why Mohindra was discharged by the respondent. If we are satisfied that any part of the reason for his discharge was for an impermissible reason as set out in section 134b(2) of the Environmental Protection Act, then the employer will have breached the Act. As the Board wrote in Commonwealth Construction Company [1987] OLRB Rep. July 961 in discussing its inquiry under the Occupational Health and Safety Act:
 - 21. The issue we must decide is why the complainants were discharged. This turns on our finding of the facts, based on our assessment of the evidence and whether we believe the company's claim that it discharged them because they wouldn't perform their work, or the complainants' claim that they were performing their work and never took company time for their pursuits, and were discharged because they raised safety matters. Put in terms of the statutory language, were the complainants discharged because they acted in compliance with the Act or because they sought its enforcement? It is important to understand that what is protected by the Act is the right of employees not to be threatened or disciplined because of their acting in compliance with the Act (or regulations etc.) or seeking its enforcement. An employee might engage in conduct warranting discipline, and in those circumstances an employer can impose discipline, provided the discipline is not motivated even in part

by a concern that the employee was acting in compliance with or seeking to enforce the Act. Discipline levied for that reason is proscribed by section 24(1). Whether a breach is found will depend on whether the Board concludes that the disciplinary response was even partially prompted because the employee was seeking to exercise his or her rights under the Act. In this respect, the Board's inquiry under section 24 of the Act parallels the nature of the inquiry under section 89 of the *Labour Relations Act*. As the Board noted in *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577:

44. We now turn to the unfair labour practice provisions underlying this complaint and to a consideration of the law as it relates to the degree of anti union motive necessary to establish such violations of the Act. For the purpose of our analysis it is useful to distinguish between decisions affecting individual employees and major business decisions having potentially broader impact. In dealing with the treatment of individual employees this Board has consistently held that if only one of the reasons for an employer's actions against an employee (discharge, layoff, transfer, demotion, etc.) is related to union activity the action is in contravention of the Act. Given the reverse legal onus mandated by section 79 (4a) the Board has held that to find there has been no violation of the Act in these kinds of cases it must be satisfied that the employer's actions were not in any way motivated by anti-union sentiment. The Board summarized this approach and the effect of the statutory reversal of the legal burden of proof in *The Barrie Examiner* case, [1975] OLRB Rep. Oct. 745 as follows:

...the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

(See also Pop Shoppe (Toronto) Limited, [1976] OLRB Rep. June 294 and Pop Shoppe (Toronto) Limited, [1976] OLRB Rep. June 299.) Judicial support for this application of the law is found in Regina v. Bushnell Communications et al (1973), 1 O.R. (2d) 422 wherein the Ontario High court overturned a lower court decision which had dismissed a complaint under section 110(3) of the Canada Labour Code, which is identical in all material respects to section 58 of The Labour Relations Act, on the grounds that membership in a union was not established as the 'principal reason' for the termination of employment. The High Court held:

In considering an enactment devoid of the words 'sole reason' or 'for the reason only' applied to the act of dismissal and resting only on the word 'because', the Court must take an expanded view of its application. If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, s. 110(3) of the *Canada Labour Code* has been transgressed.

The decision of the High Court was upheld on appeal by the Court of Appeal (4 O.R. (2d) 288) and was cited with approval by the Federal Court

in Sheehan and Upper Lakes Shipping Limited et al (1977), 81 D.L.R. (3d) 208. In this jurisdiction, therefore, the Board, with judicial support, applies a 'taint theory' in dealing with alleged unlawful treatment of individual employees. If an employer's actions impact against employees and the motives underlying the employer's action are in any way tainted by an anti-union animus the employer is in violation of the Act.

The same sorts of considerations and analysis apply in our view to alleged violations of Section 24 of the *Occupational Health and Safety Act*. If the respondent has convinced us that no part of the reason for the discharges was concern over the complainants' seeking enforcement of the Act or acting in compliance with it, then the respondent will not have violated section 24 of the Act.

- 31. There are of course differences between these pieces of legislation but under each of them the approach the Board takes is to assess whether any part of the motivation for the discharge was for an impermissible reason as set out in the statute. Under this Act, as under the *Occupational Health and Safety Act* or the *Labour Relations Act*, the burden of proof is upon the employer (see section 134b(10)).
- I agree with the description of the question to be posed and where the burden of proof lies, as set out in *Bakelite*. The applicant also referred in argument to *Bo Ramjit* [1990] OLRB Rep. Aug. 874, *Saco Fisheries* [1988] OLRB Rep. Oct. 1087, and *The Barrie Examiner* [1975] OLRB Rep. Oct. 745. These cases deal with the manner in which the Board should apply the statutory provisions requiring the employer to bear the type of evidentiary onus contemplated by section 174(10) of the EPA. I accept the characterization of onus as it is described in these cases.
- It is necessary however to be precise in applying the evidentiary onus described in section 174(10) of the EPA. The onus quite clearly applies to the proof of conduct alleged to be in contravention of the EPA. In the circumstances of the instant case, this means that the respondents would bear the onus of demonstrating that their conduct in March of 1994 did not contravene the provisions of section 174(2) of the EPA. The application of the onus however does not mean that the respondents bear the onus of demonstrating that the applicant was not an employee in November of 1993. In my view, the usual evidentiary burden applies to the proof of this fact. This means that the applicant must prove on a balance of probability that he was in fact an employee at the time of the alleged reprisals. This is no different from the way in which the burden of proof borne by an employer in a wrongful dismissal action or a grievance alleging dismissal for just cause does not extend to the proof of an employment relationship or the existence of a collective agreement. This point is discussed by the Board in Simcoe Leaf Tobacco Company Limited [1975] OLRB Rep. Mar. 186. At paragraph 14, the Board in that decision refers to a passage from National Automatic Vending Co. Ltd. (1963) 63 CLLC 16,278 as follows:

In order to shift the burden of justification to the employer in an action by a former employee against an employer at common law for damages for wrongful dismissal, the plaintiff employee need prove only (1) the contract of hiring, (2) the fact of his discharge and (3) his damages. When he does this, an onus then shifts to the defendant employer to establish that proper cause existed for the dismissal. (See George Ditchfield v. Gibson Manufacturing Company Ltd. [(1961) 61 CLLC para. 15,362 (Ont. HC)], McInnes v. Ferguson (1899) 32 NSR 516; Butler v. C.M.R. [1940] 1 D.L.R. 256.)

- 30. As a result, the evidentiary onus described in section 174(10) does not apply to the determination of whether the applicant was an employee in March of 1994. It is for the applicant to prove this fact on a balance of probability.
- 31. Turning to the question then of whether the applicant was terminated in November of 1993, the Board's task is not to determine whether the respondents had at that point cause for dismissal. It may be that whatever justification is now advanced in support of their contention that the

applicant was dismissed, may not amount to cause in the manner in which that term applies in civil matters, before boards of arbitration, or before this Board in an application under section 81(2) of the Act. The reasons put forward by the employer for the purported dismissal are relevant to the extent that they go the the credibility of the employer's position. This is quite different however from putting the employer to the proof of cause to support the proposition that the employee was dismissed.

- The respondents have argued that the applicant was terminated in November of 1993 32. without any prospect of recall. The respondents did not clearly indicate this on the applicant's record of employment. Their explanation for this was that they did not wish to deprive the applicant of the ability to apply for and receive unemployment insurance benefits. There is circumstantial evidence which rather strongly supports the respondents' characterization of this issue. Firstly, the applicant continued to remain laid off for months following the cessation of employment in 1993. This is in contrast to the two earlier periods of inactivity where he remained off for a matter of weeks. Secondly, in the two earlier periods, he was paid the three statutory holidays by the employer prior to his date of recall. He was not paid for these holidays after November 1993. Thirdly, the applicant left the respondent's premises prior to the completion of his shift, suggesting that the termination was for something other than simply a lay off due to work reduction. Fourthly, the applicant was replaced on the loader with an employee who although he had more seniority than the applicant, clearly had less experience on the loader. This implies that the work remained to be done and the lay off was for some purpose other than a reduction in work. Finally, it is undisputed that when the applicant first went to the respondents' work site in March to see if there would be work for him, Mr. Carriere avoided talking to him about being recalled. At this time, there is no evidence to suggest that the respondents knew about the fact that the applicant had in some way assisted in the investigations by the MOE. The only other explanation for Mr. Carriere's evasiveness is that he did not want the applicant returning to work and wished him to remain off.
- 33. In the face of the circumstantial evidence described in the paragraph above, the applicant suggested that the period of lay off beginning in 1993 was the same in all respects as the two earlier periods of layoff. He stated that he had the same expectations of being recalled in the spring of 1994 as he had held in the two earlier layoff periods. With respect, I cannot agree. It may be that the applicant honestly believed that he would be recalled when he went to see Mr. Carriere in March of 1994. His honest belief in this regard however does not determine the issue. On the balance of probability, I find that the respondent Vaillancourt terminated its employment relationship with the applicant in November of 1993 when he was laid off. As a result, the applicant was not an employee of the respondent Vaillancourt in March of 1994.
- I now turn to the remarks made to the applicant by Emile Vaillancourt on March 28, 1994. The applicant's undisputed evidence was that Mr. Vaillancourt made it clear to the applicant that he might be recalled to work depending on how he conducted himself when the matter of the charges under the EPA went to Court. In the absence of any explanation or comment from Mr. Vaillancourt, I conclude that these remarks were either meant as a reprisal against the applicant for having assisted the MOE in its investigations, or at the least, his remarks were designed to influence the applicant in his role as witness for the Crown in the pending court proceedings. In either case, the remarks are an inappropriate exercise of an employer's power to withhold work for purposes of either punishing the applicant or to improperly influence his behaviour. I have no difficulty in finding that Mr. Vaillancourt's remarks were inappropriate and amounted to the type of conduct that is supposed to be precluded by the operation of section 174 of the EPA. What is also just as clear is that the applicant was not an employee of the respondent Vaillancourt, at the time

that the reprisal was made. But for the severance of his employment relationship with Vaillancourt in November of 1993, I would have found that the application should be allowed.

35. At the outset of the hearing, the respondents made a number of preliminary motions dealing with the procedure followed by the Board in this case. Those motions were dismissed and the matter proceeded accordingly. In light of the Board's disposition, I have not dealt with the issues and rulings in these reasons. If either party wishes the Board to issue further reasons dealing with the motions made by the respondent, it may request those reasons within thirty days of the date of this decision. The Board orders this application dismissed.

COURT PROCEEDINGS

2916-93-M; 2957-93-U (Court File No. 119/94) The Great Atlantic & Pacific Company of Canada, Limited, Applicant v. United Food & Commercial Workers International Union, Locals 175 and 633, Brian Donaghy, Darrin Fay, Frank Fortunato, Rick Fox, Helmut Halla, Robert Liotti, Donald Lupton, Gene Martin, Pam Murdock, Patricia O'Doherty, Kathy Papaconstantino, Irene Park Cliff Skinner, and The Ontario Labour Relations Board, Respondents

Judicial Review - Picketing - Strike - Strike Replacement Workers - Right of Access - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed - Employer seeking judicial review - Divisional Court finding that Board exceeded its jurisdiction by failing to address and decide whether there was an exercise of the right to picket granted under subsection 11.1(3) of the *Act* before considering whether to exercise its discretion under subsection 11.1(5) to impose restrictions - Application for judicial review allowed

Board Decision reported at [1994] OLRB Rep. March 303.

Ontario Court (General Division) (Divisional Court), Dunnet, Feldman and Winkler JJ., July 25, 1995.

Feldman J.: The company seeks judicial review of the decision of the Labour Board wherein it declined to place restrictions on certain picket-line activities of the union during a strike at Miracle Mart stores in November, 1993.

The case seeks interpretation of a new section of the *Labour Relations Act*, s. 11.1 which gives the right to picket and organize on private property to which the public has access, subject to restrictions which the Board may impose to prevent undue disruption of an applicant's operations. The

issue as formulated by the company is whether the Labour Board may exercise its jurisdiction over this picketing right by refusing to prevent, prohibit or restrict unlawful picketing.

FACTS

A legal strike by 6500 employees of A & P at 63 of its Miracle Mart stores in Ontario commenced on November 18, 1993. A & P closed the struck stores and employees set up picket lines. A & P had just stocked its shelves with fresh meat and produce, and used some non-bargaining unit employees to pack up and load these goods for removal from certain struck locations. At 16 locations the company was able to remove the perishable products. With respect to the majority of stores, there was either vague hearsay evidence or no evidence with respect to alleged obstruction by picketers of company efforts to remove these goods.

In respect of the five stores where the company had not been successful in bringing products through the picket line, the Board found:

- (a) At three of the five stores, the facts are essentially the same. Either on November 19 or November 20, there was one incident at each store where a truck owned by another company approached the loading dock for the purpose of picking up perishable products. Some picketers took up positions in front of the trucks, and at two stores they refused to stand aside when asked to do so. There is no evidence of such a request at the third store. The parties agreed that each of the three trucks were "turned away" by the picket line and were therefore unsuccessful in removing perishable products. There was no indication of whether these events lasted a few minutes or longer, whether more than one request was made, and so forth. Three other incidents of unsuccessful pick-ups were referred to without any information with respect to the cause, or any circumstances or details.
- (b) At a fourth store, the company's evidence indicated that a truck arrived for the purpose of removing perishable products. Nine picketers at the store linked hands and blocked one of two access routes to the rear of the store. The company asked the picketers to move, and they declined. The company then instructed the truck to leave. The following day, another truck approached. There were six employees picketing at the time and a bicycle rack and a car had been placed in front of one of the two access routes to the store. The company called the police, but asked the officer who arrived only to verify the fact that a car was parked there. There is no evidence that the company asked police to intervene or speak to the picketers. It was undisputed that there was another access route and loading dock to the store, and there was no suggestion that it was blocked at any time during these events.
- (c) At the fifth store, a truck encountered no difficulty approaching the loading bay and was loaded with products. According to the company's evidence during the loading process picketers parked cars in front of the truck. The mall management called police who, within a few minutes, discussed the matter with the picketers, and the cars were removed. However, several picketers then stood in front of the

truck. At the time, Mr. Federigo testified, there were no problems, and the picketers were a calm, organized bunch he felt he could reason with. The picket captain was receptive to the idea of discussing an agreement with respect to the truck, and he took a proposal back to other picketers. However, this was ultimately rejected, and one of the picketers started yelling at the others not to move. A police officer tried to calm this picketer down, which worked to some extent, according to Mr. Federigo. The company asked the police to arrest the picketers, and the police declined, although they did not say they would help in other ways. The company then decided to unload the truck after which the truck proceeded to leave without difficulty.

THE BOARD HEARING

The company applied to the Board under s. 11.1 of the *Labour Relations Act* for an order restricting the picketing at its stores which prevented the peaceful removal of perishable product. The union's application under s.73.1 was for an order preventing the company from using replacement workers to pack and load the perishable product.

The Board required the company to cease using the replacement workers to remove the perishable product. It refused to order any restrictions on the alleged "picketing" activity of the union. The company seeks judicial review of the decision of the Board an an order of this court quashing that decision, and a declaration that (1) physical blocking or obstruction by the respondents and others of access to the applicant's stores is unlawful conduct; and (2) such unlawful conduct constitutes "undue disruption of the operation of the applicant" within the meaning of s. 11.1(5) of the Act.

THE ISSUES

Mootness

As the strike ended in February 1994, the issue that was before the Labour Board is now moot. The court has a discretion to hear and determine on the merits a case where there is no longer a live issue between the parties based on three criteria:

- (1) is there still an adversarial context to the disputed issue, such as collateral consequences of the resolution of the issue;
- (2) is the expenditure of judicial resources warranted in the circumstances of the case; and
- (3) is it a case where the court should depart from its traditional role as adjudicator of live disputes as its traditional law-making function: *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 at 243-247. (S.C.C.)

One classic situation where the court has exercised its discretion to hear and decide a case which has become moot is in the context of an interim injunction in a labour dispute prohibiting certain strike action. In such cases the strike is usually resolved before an important issue in the injunction can be dealt with by the court, so that if the point is ever going to be tested, it almost invariably must be done in a case that is moot: *Borowski* (supra) at 245.

The issue of the jurisdiction of the Labour Board under the new s.11.1 of the Labour Relations Act

which arises in this case is such an important matter. The decision of this court in A & P v. Vance (1994), 16 O.R. (3d) 816 arose in the context of the original jurisdiction of the Board or the court to hear matters dealing with the exercise or purported exercise of a right under subsection 11.1(3). This case however, concerns the Board's jurisdiction once the matter is brought before it. In my view this case meets the three criteria set out above. The Ontario Court of Appeal recently heard an appeal dealing with the jurisdiction of the Ontario Court of Justice (General Division) under s. 11.1, where the injunction had expired and therefore the issue was in a sense moot. The matter proceeded with the consent of counsel also on the basis of the importance and general interest of that issue, and the fact that it was unlikely that it could be raised in another proceeding in a timely manner: Queen's University v. Canadian Union of Public Employees Local 229, 95 C.L.L.C. ¶210-015 (C.A. Ont. 1994) at paragraph 3.

Standard of Review

One of the most recent articulations of the general principles which are to be applied in determining the proper standard of review of the decision of an administrative tribunal is set out in the Supreme Court of Canada decision in Canadian Broadcasting Corporation v. Canada Labour Relations Board, Alliance of Canadian Cinema, Television and Radio Artists and Goldhawk (1995), 95 C.L.L.C. ¶210-009 at paragraph 28-30 (S.C.C.):

A. The Standard of Review

General Principles

28. The first step in the judicial review of an administrative tribunal's decision is to determine the appropriate standard of review. As was noted in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 589-90:

There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

Having regard to these and other factors, the courts have developed a spectrum that ranges from the standard of patent reasonableness at one extreme to that of correctness at the other. In this regard see generally: H. Wade MacLauchlan, "Reconciling Curial Deference with a Functional Approach in Substantive and Procedural Judicial Review" (1993), 7 C.J.A.L.P. 1.

- 29. Generally speaking, where the tribunal whose decision is under review is protected by a broad privative clause, its decision is subject to review on a standard of patent unreasonableness. However, this is only true so long as the tribunal has not committed a jurisdictional error. Jurisdictional questions addressed by the tribunal are independently reviewed on a correctness standard. An error on such a jurisdictional question will result in the entire decision of the tribunal being set aside.
- 30. In distinguishing jurisdictional questions from questions of law within a tribunal's jurisdiction, this Court has eschewed a formalistic approach. Rather, it has endorsed a "pragmatic and functional analysis" to use the words of Beetz J. in *U.E.S.*, *Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048. In that decision Beetz J. noted, at p. 1088, that it was relevant for the reviewing court to examine:

... not only the wording of the enactment conferring jurisdiction on the

administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

The goal is to determine whether the legislature intended that the question in issue be ultimately decided by the tribunal, or rather by the courts.

In applying these principles to an analysis of the jurisdiction of the Labour Board under s. 11.1, it is first necessary to break down the issues which must be determined by the Board when an application is made.

The Labour Board is protected by a very broadly worded privative clause so that curial deference is accorded to its decisions unless they are found to be patently unreasonable, or the Board has committed a jurisdictional error.

Section 11.1 is reproduced in full as follows:

- s.11.1(1) This section applies with respect to premises to which the public normally has access and from which a person occupying the premises would have a right to remove individuals.
- (2) Employees and persons acting on behalf of a trade union have the right to be present on premises described in subsection (1) for the purpose of attempting to persuade employees to join a trade union. Attempts to persuade the employees may be made only at or near but outside the entrances and exists to the employees' workplace.
- (3) During a lock-out or lawful strike, individuals have the right to be present on premises described in subsection (1) for the purpose of picketing, in connection with the lock-out or strike, the operations of an employer or a person acting on behalf of an employer. The picketing may occur only at or near but outside the entrances and exits to the operations.
- (4) No person shall interfere with the exercise of a right described in subsection (2) or (3).
- (5) On application, the Board may impose such restrictions on the exercise of a right described in subsection (2) or (3) as it considers appropriate in order to prevent the undue disruption of the operations of the applicant.
- (6) An application respecting the exercise or alleged exercise of a right described in subsection (2) or (3) may be made only to the Board and no action or proceeding otherwise lies at law.
- (7) A party to an order made under subsection (5) may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.
- (8) In the event of a conflict between a right described in subsection (2) or (3) and other rights established at common law or under the *Trespass to Property Act*, the right described in those subsections prevails.

Subsection (1) defines the physical premises to which the section applies.

Subsections (2) and (3) grant the new rights to organize and picket in those premises, subject to the limitations set out.

Subsection (4) prohibits anyone from interfering with the exercise of a right described in subsections (2) or (3).

Subsection (5) sets out the jurisdiction of the Board when an application is made to it. That jurisdiction is to impose restrictions on the exercise of a right described in subsections (2) or (3) "in order to prevent the undue disruption of the operations of the applicant."

Subsection (6) requires that an application "respecting the exercise or alleged exercise of a right" in subsections (2) or (3) be made only to the Board and that no action or proceeding lies at law.

Subsection (7) provides for the filing and enforcement of orders of the Board as court orders.

Subsection (8) resolves any conflict between the rights granted in subsections (2) and (3) and "other rights established at common law or under the *Trespass to Property Act*" in favour of the rights granted in the section.

When an application is brought to the Board, it is brought in respect of the exercise or the alleged exercise of a right under subsections (2) or (3) (ss.(6)). The first issue, therefore, for the Board to determine is whether the activities of the respondent amount to the exercise of one of the statutorily granted rights. Only if they are does the Board proceed to exercise its statutory jurisdiction under subsection (5), which is to impose such restrictions on the exercise of the right as it considers appropriate to prevent undue disruption.

The first question, whether there is the exercise of one of the rights, defines the jurisdiction of the Board. Within that question are two sub-issues: (i) the meaning of the right granted; and (ii) whether on the facts there was an exercise of that right. To the extent that the Board is answering the second sub-issue and is considering the evidence before it and applying the words of the section to the facts as it finds them, the standard of judicial review is whether the decision is patently unreasonable. Deciding whether particular actions amount to the *exercise* of the right to picket in a shopping centre, for example, is a decision for the Board to which curial deference must apply. The wording of subsection (6) envisages that in the application to the Board, certain activities may be alleged to amount to organize or picketing or may be alleged to have taken place in a shopping centre, and therefore, of necessity, the Board must first make a preliminary finding on the evidence presented, what the activities were, and whether the activities were an exercise of one of the rights.

However, where the Board is interpreting the provisions of subsections (1), (2) and (3) of s. 11.1, so that it is in effect defining the scope of the rights, that definition is a jurisdictional question. The Board only has jurisdiction to impose restrictions where there is the exercise of one of the rights, as defined in the statute.

In considering the question posed in the CBC case, "whether the Legislature intended that the question in issue be ultimately determined by the tribunal, or rather by the courts", one looks first at the enactment conferring jurisdiction.

Section 11.1(3) creates a new right to picket in a shopping centre. As stated by the Court of Appeal in *Queen's University v. Canadian Union of Public Employees, Local 229*, 95 C.L.L.C. ¶210-015 (C.A. Ont. 1994) at paragraph 17, this amendment to the *Labour Relations Act* was enacted in response to the decision in *Harrison v. Carswell*, [1976] 2 S.C.R. 200, wherein the majority held that a person who, during a lawful strike, had engaged in peaceful picketing of his employer's premises in a shopping plaza was guilty of trespass although the public had an unrestricted invitation to enter the plaza.

However, the section does not merely state that picketing in a shopping mall does not constitute trespassing, but grants a right to picket in a shopping mall during a lock-out or lawful strike at or near the outside of exits and entrances of the workplace. Furthermore there is a blanket prohibition against interference with the exercise of that right. The only restrictions that can be imposed on the right are those which the Labour Board may impose to prevent the undue disruption of the operations of an applicant. The section is silent, for example, of any ability to seek or impose

restrictions to prevent bodily injury or damage to property, not connected to disruption of operations of an applicant.

Therefore, although the Board may be required to interpret the meaning of premises described in subsection (1), or the meaning of the rights given in subsections (2) and (3) in order to determine in any case whether there is an exercise of the right upon which it can consider imposing restrictions, the definition of the right itself is not left to the Board. It is granted by the statute. To the extent that the Board interprets the right in the process of exercising its jurisdiction to impose restrictions, it must be correct in that interpretation.

The fact that no one may interfere with the exercise of the right is a further indication of the intention of the Legislature that the right must be correctly interpreted and applied. In the decision of the Board under review, the chair notes at p. 46 that "I do not doubt that the police forces of this province would be inclined to tread warily in this area in light of the statutory right and the prohibition against interference with that right established by s. 11.1. At the same time, where police involvement is skilled and neutral, it can resolve a significant number of picket line problems." Of course, if the right to picket granted by s.11.1(3) is either unclear in its delineation or is one which may include certain activities in one case but not include them in another case depending on the facts of any particular situation, then the police may in effect be precluded from taking any action which might be found to be interference with that right.

The issue is further illustrated by another example from the case. A bicycle rack was placed in front of a receiving bay. The Board declined in the end to decide whether that action amounted to picketing, but earlier in its reasons, concluded that "There was no suggestion that the company could not simply have removed it." (p.44). Of course if placing a bicycle rack in front of a receiving bay is the exercise of the right to picket, then the company would be in violation of s. 11.1(4), interfering with the exercise of a right described in subsection (3), had it removed the bicycle rack.

An analysis of the construction of s.11.1, the granting of new rights to organize and picket, together with the discretion specifically granted to the Labour Relations Board to impose restrictions on the exercise of those rights in order to prevent undue disruption of the operations of an applicant, make it clear that curial deference is to be accorded to the board in the determination of whether on the evidence, there has been the exercise of a right, and in the exercise of its granted discretion to impose restrictions. But on the jurisdictional question of the definition of the rights themselves, the standard of review is correctness.

THE DECISION IN THIS CASE

The Board erred by failing to address and decide the first question: was there an exercise of the right to picket granted in subsection 11.1(3)? After reviewing the evidence of the five stores where evidence was called or agreed upon in some detail, the Board stated: "Again, I find this evidence insufficient to persuade me that restrictions are appropriate to prevent undue disruption." (p. 38). In other words, the Board turned immediately to the issue of restrictions without making any finding on the exercise of a right. And again at page 46 of the decision, the Board states: "I note that it is not necessary for me to decide whether or not the placement of the cars or the bicycle rack amounts to picketing, because I am not prepared to impose restrictions in any event."

The Board discusses the nature and purpose of picketing at paragraphs 32 - 34, concluding that "the boundaries of what constitutes picketing will crystallize on a case by case basis". Although this may be an appropriate approach by which the Board may wish to consider the evidence of the exercise of the right to picket in shopping malls, the right itself is to be interpreted using the cannons of statutory interpretation.

The first of those is to read the provision in the context of the statute as a whole. Section 2.1 sets out the purposes of the *Labour Relations Act*:

- s.2.1 The following are the purposes of this Act:
- 1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the *lawful activities* of the trade union. (emphasis added)
- 2. To encourage the process of collective bargaining so as to enhance,
 - i. the ability of employees to negotiate terms and conditions of employment with their employer,
 - the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and
 - iii. increased employee participation in the workplace.
- 3. To promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions.
- 4. To provide for effective, fair and expeditious methods of dispute resolution.

It is clear from s.2.1 1. that the Act is to be interpreted to ensure protection of the right of employees to participate in the *lawful* activities of the trade union. Furthermore, s.11.1 grants a new right to picket in a shopping mall. The concept of picketing must be interpreted in the context of the grant of that right. As stated above, it is not merely permission to picket, but a right to do so without interference. Subsection 11.1(8) speaks of the new rights prevailing, in the case of conflict, over other common law rights or rights under the *Trespass to Property Act*. That section does not define the new rights themselves and therefore does not suggest that they include what was previously unlawful activity. Rather, it takes effect only once there is the exercise of one of the new rights, to ensure that that right prevails over certain other existing rights.

In this case the Board was required to make a finding (1) as to whether any of the actions taken by the striking employees amounted to obstruction of ingress and egress to the premises of the applicant and, if so, (2) whether such activity falls within the right to picket without interference. On the second finding, the Board is required to be correct.

In presenting its case below, the union urged the Board to consider the cases of *Nedco Ltd. v. Nichols* (1973), 3 O.R. 944, *Blackstone Industrial Products Ltd. v. Parsons* (1979), 23 O.R. (2d) 529, and *Gravel & Lake Services Ltd. v. International Woodworkers of America - Canada, Local 2693* (1989), 37 C.P.C. (2d) 292 as standing for the proposition that some damage and interference by picketers will not be enjoined by the courts. Therefore, the issue of whether there was obstruction amounting to otherwise unlawful picketing and if so, whether such unlawful picketing was within the right to picket granted by s.11.1, was clearly before the Board. Because the Board was not prepared to order any restrictions on the activities complained of, the Board declined to consider the relevance of this case law.

Nor did it directly address and make findings as to whether the activities complained of constituted an exercise of the right to picket granted by the section, or whether they went beyond that right. Any activity associated with picketing in shopping malls not covered by the new right granted in s. 11.1, remains subject to the law as it stood before the enactment of s. 11.1.

DISPOSITION

As the Board failed to deal with the initial question as to whether there was an exercise of a right under s. 11.1 before considering its discretion to impose restrictions, the decision of the Board on that issue was made in excess of jurisdiction and is quashed. However, because the strike is over, the matter is not referred back to the Board for any further consideration.

In light of the novelty and importance of the issue before the court, there shall be no costs of the application.







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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0863-94-R: Labourers' International Union of North America, Local 527 (Applicant) v. Désourdy 1949 Paving Inc. (Respondent)

Unit: "all construction labourers in the employ of Désourdy 1949 Paving Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Désourdy 1949 Paving Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (38 employees in unit)

2454-94-R: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Jones Wood Industries Inc. (Respondent)

Unit: "all employees of Jones Wood Industries Inc. in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson and outside salespersons," (38 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

2555-94-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Interactive Media Group (Canada) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Interactive Media Group (Canada) Ltd. at 1 St. Clair Avenue West, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (133 employees in unit)

2939-94-R: International Brotherhood of Painters and Allied Trades (Applicant) v. 1071985 Ontario Corporation c.o.b. M. Gil Drywall Systems Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of 1071985 Ontario Corporation c.o.b. M. Gil Drywall Systems Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of 1071985 Ontario Corporation c.o.b. M. Gil Drywall Systems Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (Clarity Note)

2946-94-R: Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Applicant) v. 724695 Ontario Limited, c.o.b. as Michel's Baguette (Respondent)

Unit: "all employees of 724695 Ontario Limited, c.o.b. as Michel's Baguette at 3401 Dufferin Street in the City of North York, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff" (55 employees in unit)

3561-94-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Montank Transit Inc. (Respondent)

Unit: "all employees of Montank Transit Inc. in the City of Hamilton, save and except Foremen, persons above the rank of Foreman, office and clerical staff" (10 employees in unit) (Clarity Note)

3995-94-R: United Food and Commercial Workers International Union (Applicant) v. Highline Produce Limited (Respondent)

Unit: "all employees of Highline Produce Limited in the Town of Learnington save and except supervisors, persons above the rank of supervisor, mushroom biochemist, office and sales staff and persons employed on a seasonal basis" (200 employees in unit) (Having regard to the agreement of the parties)

4281-94-R: Labourers' International Union of North America, Local 506 (Applicant) v. Shiu Pong Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of Shiu Pong Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Shiu Pong Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit)

4543-94-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. R.J. Ralph Automotive Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of R.J. Ralph Automotive Limited in the Town of Espanola, save and except managers and persons above the rank of manager" (54 employees in unit) (Having regard to the agreement of the parties)

0007-95-R: Local Union 47 Sheet Metal Workers International Association (Applicant) v. Skarlan Water-proofing Inc. and Skarlan Enterprises Limited (Respondent)

Unit: "all roofers in the employ of Skarlan Waterproofing Inc. and Skarlan Enterprises Limited, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all roofers in the employ of Skarlan Waterproofing Inc. and Skarlan Enterprises Limited, in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

0073-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Atlantic Packaging Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Atlantic Packaging Products Ltd. in the City of Whitby, save and except Co-ordinators, persons above the rank of Co-ordinator, Newsprint Technical Assistants, office, clerical and sales staff" (133 employees in unit)

0132-95-R: Hotel Employees, Restaurant Employees Union Local 75 (Applicant) v. International Plaza Hotel and Conference Centre (Respondent)

Unit: "all employees of International Plaza Hotel and Conference Centre in the City of Etobicoke regularly employed for not more than 24 hours per week, save and except management trainees, supervisors, persons above the rank of supervisor, office and sales staff, accounting staff, security staff, front desk staff, reservations staff, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of April 11th, 1995" (66 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0135-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. The Cadillac Fairview Corporation Limited (Respondent)

Unit: "all employees of the Cadillac Fairview Corporation Limited employed as security personnel at the

Toronto Eaton Centre at 1 Dundas Street West, 20 Queen Street West, 220 Yonge Street and 250 Yonge Street in the Municipality of Metropolitan Toronto, save and except assistant supervisors, persons above the rank of assistant supervisor, office, clerical, sales and marketing staff and employees in bargaining units for which any trade union held bargaining rights as of April 11, 1995" (41 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0206-95-R: United Steelworkers of America (Applicant) v. The Brick Warehouse Corporation (Respondent)

Unit: "all employees of The Brick Warehouse Corporation at its store in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (27 employees in unit) (Having regard to the agreement of the parties)

0274-95-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Princess Street Development (Kingston) Inc. (Respondent)

Unit: "all employees of Princess Street Development (Kingston) Inc. employed at 1187 Princess Street in the City of Kingston, save and except the General Manager and persons above the rank of General Manager" (18 employees in unit)

0304-95-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. B & W Bingley Steel Works (a Division of 140952 Canada Inc.) (Respondent)

Unit: "all boilermakers and boilermakers' apprentices in the employ of B & W Bingley Steel Works (a Division of 140952 Canada Inc.) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermakers' apprentices in the employ of B & W Bingley Steel Works (a Division of 140952 Canada Inc.) in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (24 employees in unit)

0353-95-R: United Steelworkers of America (Applicant) v. Grand & Toy Limited (Respondent)

Unit: "all employees of Grand & Toy Limited at 125 Bermondsey Road, in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical, sales staff and maintenance mechanics and mechanics' helper" (78 employees in unit) (Having regard to the agreement of the parties)

0400-95-R: Canadian Security Union (Applicant) v. Cambrian Alliance Protection Services Inc. (Respondent)

Unit: "all security officers in the employ of Cambrian Alliance Protection Services Inc. in the District of Cochrane, save and except supervisors and persons above the rank of supervisor" (18 employees in unit) (Having regard to the agreement of the parties)

0405-95-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Scott Hendry Electrical (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Scott Hendry Electrical in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Scott Hendry Electrical in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0460-95-R: Teamsters Local Union No. 419 (Applicant) v. Dominion Citrus & Drugs Ltd. (Respondent)

Unit: "all employees of Country Fresh Packaging, an operating division of Dominion Citrus & Drugs Ltd. in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (14 employees in unit) (Having regard to the agreement of the parties)

0477-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Woodchester Nissan Inc. (Respondent)

Unit: "all employees of Woodchester Nissan Inc. at 2560 Motorway Blvd. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (15 employees in unit) (Having regard to the agreement of the parties)

0479-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Native Leasing Services (Respondent)

Unit: "all employees of Native Leasing Services employed at the Na-Me-Res Men's Residence in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week" (11 employees in unit) (Having regard to the agreement of the parties)

0499-95-R: United Steelworkers of America (Applicant) v. Alumicor Limited (Respondent)

Unit: "all employees of Alumicor Limited in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff" (45 employees in unit)

0504-95-R: Public Service Alliance of Canada (Applicant) v. Weeneebayko Health Ahtuskaywin (Respondent)

Unit: "all employees of Weeneebayko Health Ahtuskaywin at Moose Factory General Hospital in Moose Factory, employed as Security Guards, save and except the General Manager and persons above the rank of General Manager" (9 employees in unit) (Having regard to the agreement of the parties)

0508-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Barton Retirement Inc. (Respondent)

Unit: "all employees of Barton Retirement Inc. c.o.b as Wellington Retirement Home in the City of Hamilton, save and except Supervisors, persons above the rank of Supervisor, Registered and Graduate Nurses and employees in bargaining units for which any trade union held bargaining rights as of May 1st, 1995" (5 employees in unit) (Having regard to the agreement of the parties)

0509-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: "all employees of Empire Maintenance Industries Inc. engaged in cleaning and maintenance at the Midland Walwyn Building, 22 Front Street West, in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, office and sales staff" (5 employees in unit) (Having regard to the agreement of the parties)

0514-95-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Elgin County Roman Catholic Separate School Board (Respondent)

Unit: "all cafeteria workers, Educational Assistants-Library, Educational Assistants-Social Skills and Educational Assistants-Special Education employed by the Elgin County Roman Catholic Separate School Board in Elgin County, save and except Supervisors and persons above the rank of Supervisor" (18 employees in unit) (Having regard to the agreement of the parties)

0525-95-R: United Steelworkers of America (Applicant) v. National Grocers Co. Ltd. (Respondent)

Unit: "all employees of National Grocers Co. Ltd. at 5746 Valley Way in the City of Niagara Falls, save and except Assistant Manager and persons above the rank of Assistant Manager" (4 employees in unit) (Having regard to the agreement of the parties)

0527-95-R: Ontario Public Service Employees Union (Applicant) v. Cerminara Boys Residence Incorporated (Respondent)

Unit: "all employees of Cerminara Boys Residence Incorporated in the City of Niagara Falls, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) (Having regard to the agreement of the parties)

0537-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Work Wear Corporation of Canada Ltd. (Respondent)

Unit: "all employees of Work Wear Corporation of Canada Ltd. at 1587 McDougall Street in the City of Windsor, save and except supervisors, persons above the rank of supervisor, drivers and office and sales staff" (5 employees in unit) (Having regard to the agreement of the parties)

0543-95-R: Canadian Union of Public Employees (Applicant) v. Dundas Public Library Board (Respondent)

Unit: "all employees of the Dundas Public Library Board in the Town of Dundas, regularly employed for not more than 24 hours per week, save and except Department Heads, persons above the rank of Department Head, Bookkeeper Accountant/Office Administrator, temporary workers, students employed during the school vacation period and student pages" (4 employees in unit) (Having regard to the agreement of the parties)

0547-95-R: Canadian Union of Public Employees (Applicant) v. Fairhaven Home for Senior Citizens (Respondent)

Unit: "all office and clerical employees of Fairhaven Home for Senior Citizens in the City of Peterborough, save and except Director of Administrative Services, persons above the rank of Director of Administrative Services, Payroll and Benefits Officer, Administrative Assistant to the Administrator, Coordinator of Volunteer Services, Coordinating Chaplain, and persons in bargaining units for which any trade union held bargaining rights as of May 5, 1995" (6 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0554-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Crystal Maintenance Contractors Limited (Respondent)

Unit: "all employees of Crystal Maintenance Contractors Limited engaged in cleaning and maintenance at 36 Adelaide Street East in the Municipality of Metropolitan Toronto, save and except non-working supervisors, persons above the rank of non-working supervisor, office and clerical staff" (21 employees in unit) (Having regard to the agreement of the parties)

0556-95-R: Ontario Nurses' Association (Applicant) v. ReliaCARE Inc. c.o.b. The Village Health Care Centre (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity of ReliaCARE Inc. c.o.b. as The Village Health Care Centre in the Town of Ridgetown, save and except the Director of Care and persons above the rank of Director of Care" (9 employees in unit) (Having regard to the agreement of the parties)

0576-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Delisle Foods Ltd. (Respondent)

Unit: "all employees of Delisle Foods Ltd. at 1310 Aimco Boulevard in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons for whom any union held bargaining rights as of April 20, 1995" (3 employees in unit) (Having regard to the agreement of the parties)

0578-95-R: United Steelworkers of America (Applicant) v. EAZ-Lift Spring Corp. (Ontario) Limited (Respondent)

Unit: "all employees of EAZ-Lift Spring Corp. (Ontario) Limited in the City of London, save and except supervisors and persons above the rank of supervisor, office and sales staff" (11 employees in unit) (Having regard to the agreement of the parties)

0588-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Wescast Industries Inc. (Respondent)

Unit: "all employees of Wescast Industries Inc. in the Township of Adelaide, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (27 employees in unit) (Having regard to the agreement of the parties)

0589-95-R: Canadian Union of Professional Security Guards (Applicant) v. Elite Building Services Inc. (Respondent)

Unit: "all employees of Elite Building Services Inc. at Old Don Jail, 550 Gerrard Street, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (6 employees in unit) (Having regard to the agreement of the parties)

0590-95-R: United Steelworkers of America (Applicant) v. Scott's Food Services, A Division of Scott's Hospitality Inc. (Respondent)

Unit: "all employees of Scott's Food Services, A Division of Scott's Hospitality Inc. c.o.b. as K.F.C. at 2296 Eglinton Avenue West in the Municipality of Metropolitan Toronto, save and except Assistant Managers, persons above the rank of Assistant Manager, office and clerical staff and drivers" (18 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0594-95-R: United Steelworkers of America (Applicant) v. Can Mar Manufacturing Inc. (Respondent)

Unit: "all employees of Can Mar Manufacturing Inc. at 5869 Progress Street in the City of Niagara Falls, save and except supervisors and persons above the rank of supervisor, office clerical and sales staff" (12 employees in unit) (Having regard to the agreement of the parties)

0600-95-R: Canadian Union of Public Employees (Applicant) v. Select Living (1991) Ltd. (Respondent)

Unit: "all employees of Select Living (1991) Ltd., The Georgian in the District of Cochrane, save and except Nursing Supervisor, Manager, Activity/Marketing Director and Business Office Manager" (21 employees in unit) (Having regard to the agreement of the parties)

0603-95-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. CAW Community Development Group (Ontario) Inc. (Respondent)

Unit: "all employees of CAW Community Development Group (Ontario) Inc. in the Cities of Mississauga, Oakville, Guelph, Brampton, Bradford and Barrie, save and except Portfolio Administrator, persons above the rank of Portfolio Administrator and Office Co-ordinator" (20 employees in unit) (Having regard to the agreement of the parties)

0604-95-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Pembroke Observer (Respondent)

Unit: "all employees of the Pembroke Observer in its Editorial Department in the Town of Pembroke, save and except Managers and persons above the rank of Manager" (9 employees in unit) (Having regard to the agreement of the parties)

0618-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in cleaning and maintenance at 145 King Street East, in the Municipality of Metropolitan Toronto, save and except non-working supervisors, persons above the rank of non-working supervisor, office and clerical staff and students employed during the school vacation period" (4 employees in unit) (Having regard to the agreement of the parties)

0631-95-R: United Food & Commercial Workers Union (Applicant) v. Quinterra Property Maintenance Inc. (Respondent)

Unit: "all employees of Quinterra Property Maintenance Inc. in the Regional Municipality of Sudbury, save and except supervisor and persons above the rank of supervisor" (57 employees in unit) (Having regard to the agreement of the parties)

0633-95-R: Canadian Union of Public Employees (Applicant) v. Port Colborne General Hospital (Respondent)

Unit: "all paramedical employees of Port Colborne General Hospital in the City of Port Colborne, save and except supervisors, persons above the rank of supervisor, and persons for whom a trade union held bargaining rights on the date of application" (21 employees in unit) (Having regard to the agreement of the parties)

0643-95-R: IWA Canada (Applicant) v. Quality Manufactured Homes Ltd. (Respondent)

Unit: "all employees of Quality Manufactured Homes Ltd. in the County of Wellington, save and except forepersons, persons above the rank of foreperson, office and sales staff" (62 employees in unit) (Having regard to the agreement of the parties)

0658-95-R: Ontario Public Service Employees Union (Applicant) v. The Crest Centre (Meadowcrest) Inc. (Respondent)

Unit: "all employees of The Crest Centre (Meadowcrest) Inc. in the County of Middlesex, save and except Team Leaders, persons above the rank of Team Leader and Secretary/Receptionist" (30 employees in unit) (Having regard to the agreement of the parties)

0665-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Unique Communications Inc. (Respondent)

Unit: "all employees of Unique Communications Inc. in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff" (18 employees in unit) (Having regard to the agreement of the parties)

0683-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Sterling Place Limited Partnership c.o.b. as Sterling Place Retirement Lodge (Respondent)

Unit: "all registered, graduate and under graduate nurses of Sterling Place Limited Partnership c.o.b. as Sterling Place Retirement Lodge, in the City of Ottawa, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0692-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. The Westin Harbour Castle Hotel (Respondent)

Unit: "all security guards employed by The Westin Harbour Castle Hotel in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales, clerical and administrative staff" (6 employees in unit) (Having regard to the agreement of the parties)

0711-95-R: Drywall Acoustic Lathing & Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Concorde Drywall Company Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Concorde Drywall Company Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Concorde Drywall Company Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

0734-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. ITT Automotive a division of ITT Industries of Canada Ltd. (Respondent)

Unit: "all employees of ITT Automotive a division of ITT Industries of Canada Ltd. in the Village of Glencoe, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff" (221 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0755-95-R: United Steelworkers of America (Applicant) v. Royce Corporation (Respondent)

Unit: "all employees of Royce Corporation in the City of Orillia, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (82 employees in unit) (Having regard to the agreement of the parties)

0780-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Responsive Marketing Group Inc. (Respondent)

Unit: "all employees of Responsive Marketing Group Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (115 employees in unit) (Having regard to the agreement of the parties)

0796-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation at 55 Bloor Street West, also known as the Manulife Centre, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week" (15 employees in unit) (Having regard to the agreement of the parties)

0799-95-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Concorde Drywall Co. Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Concorde Drywall Co. Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Concorde Drywall Co. Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit) (*Clarity Note*)

0818-95-R: Teamsters Local Union 938 (Applicant) v. Atlas Copco Compressors Canada, a division of Atlas Copco Canada Inc. (Respondent)

Unit: "all employees of Atlas Copco Compressors Canada, a division of Atlas Copco Canada Inc. working in and out of the Town of Woodbridge, save and except supervisors, persons above the rank of supervisor, office and sales staff" (5 employees in unit) (Having regard to the agreement of the parties)

0822-95-R: United Steelworkers of America (Applicant) v. Carecor Security Services Inc. (Respondent)

Unit: "all security guards employed by Carecor Health Services Ltd. in the City of Etobicoke, the City of Toronto and the City of York, save and except Facility Supervisors, persons above the rank of Facility Supervisor and security guards employed at Central Hospital" (38 employees in unit) (Having regard to the agreement of the parties)

0828-95-R: Union des Chauffeurs de Camions, Hommes d'Entrepots et Autres Ouvriers, Teamsters Local 106 (Applicant) v. WM Hull/Ottawa Inc. (Respondent)

Unit: "all employees of WM Hull/Ottawa Inc. in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, garage and office employees" (35 employees in unit) (Having regard to the agreement of the parties)

0840-95-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Simcoe County Roman Catholic Separate School Board (Respondent)

Unit: "all Educational Assistants employed by The Simcoe County Roman Catholic Separate School Board in the elementary and secondary schools in the County of Simcoe and the District of Muskoka, save and except employees in bargaining units for which any trade union held bargaining rights as of May 26, 1995" (61 employees in unit) (Having regard to the agreement of the parties)

0874-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. National-Standard Company of Canada, Limited (Respondent)

Unit: "all office and clerical employees of National-Standard Company of Canada, Limited at 20 Campbell Road in the City of Guelph, save and except Supervisors, persons above the rank of Supervisor, Health and Safety Co-ordinator, Administration Co-ordinator, Production Control Co-ordinator, Engineers, Metallurgists and other Scientists, sales staff, persons employed for not more than 24 hours per week, co-operative students and students employed during the school vacation period" (3 employees in unit) (Having regard to the agreement of the parties)

0878-95-R: Christian Labour Association of Canada (Applicant) v. The Ontario Club (Respondent)

Unit: "all employees of The Ontario Club in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (34 employees in unit) (Having regard to the agreement of the parties)

0915-95-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. L. G. Source Trading Enterprises Inc. (Respondent)

Unit: "all employees of L. G. Source Trading Enterprises Inc. in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (17 employees in unit) (Having regard to the agreement of the parties)

0923-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. CAA Auto Club & Travel Agency Inc. (Respondent)

Unit: "all employees of CAA Auto Club & Travel Agency Inc. in the City of Windsor, save and except Supervisors, persons above the rank of Supervisor and Executive Assistants" (81 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0943-95-R: IWA-CANADA (Applicant) v. Lajambe Forest Products Limited (Respondent)

Unit: "all employees of Lajambe Forest Products Limited in the Municipality of Sundridge in Parry Sound District, save and except foremen, persons above the rank of foreman, office and sales staff, head grader, head log scaler, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period or pursuant to a co-operative work program in conjunction with a school, college or university" (2 employees in unit) (Having regard to the agreement of the parties)

0944-95-R: Service Employees Union Local 268 affiliated with the S.E.I.U. A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Corporation of the Township of White River (Respondent)

Unit: "all employees of The Corporation of the Township of White River in the Township of White River employed at the Township of White River Ambulance Service, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of May 31, 1995" (8 employees in unit) (Having regard to the agreement of the parties)

0946-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. General Electric Canada Inc. (Respondent)

Unit: "all cleaners employed by General Electric Canada Inc. at its Nuclear Fuel Pellet Operation in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor,

office, clerical and sales staff and employees for whom a trade union holds bargaining rights as of June 1, 1995" (5 employees in unit) (Having regard to the agreement of the parties)

0971-95-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Village Park Inc. (Respondent)

Unit: "all employees of Village Park Inc. c.o.b. as Village Park Retirement Home in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (25 employees in unit) (Having regard to the agreement of the parties)

0990-95-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Imperial Parking Limited (Respondent)

Unit: "all parking attendants of Imperial Parking Limited c.o.b. as Citipark in the City of London, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (31 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0991-95-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Oxford Child and Youth Centre (Respondent)

Unit: "all employees of the Oxford Child and Youth Centre, employed in the County of Oxford, save and except Supervisors, persons above the rank of Supervisor and Administrative Assistant" (10 employees in unit) (Having regard to the agreement of the parties)

0993-95-R: International Brotherhood of Electrical Workers Local 115 (Applicant) v. Division 16 Electrical Services (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Division 16 Electrical Services in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Division 16 Electrical Services in all sectors of the construction industry in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, and the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1005-95-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Memorial Gardens Canada Limited (Respondent)

Unit: "all employees of Memorial Gardens Canada Limited c.o.b. as Highland Memory Gardens regularly employed for not more than 24 hours per week and students employed during the school vacation period at 33 Memory Gardens Lane in the Municipality of Metropolitan Toronto, save and except Assistant Property Manager, persons above the rank of Assistant Property Manager, office, sales and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of June 7, 1995" (12 employees in unit) (Having regard to the agreement of the parties)

1006-95-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Resthaven Memorial Gardens Ltd. (Respondent)

Unit: "all employees of Resthaven Memorial Gardens Ltd. regularly employed for not more than 24 hours per week and students employed during the school vacation period, at 2700 Kingston Road in the Municipality of Metropolitan Toronto, save and except Assistant Property Manager, persons above the rank of Assistant Property Manager, office, sales and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of June 7, 1995" (9 employees in unit) (Having regard to the agreement of the parties)

1009-95-R: Ontario Nurses' Association (Applicant) v. Community Lifecare Inc. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Community Lifecare Inc. c.o.b. as Community Nursing Home, Port Hope, in the Town of Port Hope, save and except the Director of Care and persons above the rank of Director of Care" (9 employees in unit) (Having regard to the agreement of the parties)

1010-95-R: Labourers' International Union of North America, Local 837 (Applicant) v. Janitorial Development Inc. (Respondent)

Unit: "all employees of Janitorial Development Inc. employed at the Hamilton-Wentworth Regional Police Headquarters, 155 King William Street, in the City of Hamilton, save and except non-working forepersons and persons above the rank of non-working foreperson" (7 employees in unit) (Having regard to the agreement of the parties)

1017-95-R: Labourers' International Union of North America, Local 837 (Applicant) v. Janitorial Development Inc. (Respondent)

Unit: "all employees of Janitorial Development Inc. at the Hamilton Public Library, 55 York Boulevard, in the City of Hamilton, save and except non-working forepersons and persons above the rank of non-working foreperson" (10 employees in unit) (Having regard to the agreement of the parties)

1097-95-R: IWA-Canada, Local 2693 (Applicant) v. Dorion Fibre-Tech Inc. (Respondent)

Unit: "all employees of Dorion Fibre-Tech Inc. in the Township of Dorion, save and except supervisors, persons above the rank of supervisor and office staff" (19 employees in unit) (Having regard to the agreement of the parties)

1100-95-R: IWA-Canada, Local 2693 (Applicant) v. Sturgeon Timber Ltd. (Respondent)

Unit: "all employees of Sturgeon Timber Ltd., at its garage, in the Township of Dorion, save and except supervisors, persons above the rank of supervisor and office staff" (5 employees in unit) (Having regard to the agreement of the parties)

1118-95-R: United Steelworkers of America (Applicant) v. Ottawa Neighbourhood Services (Respondent)

Unit: "all employees of Ottawa Neighbourhood Services at 987 Wellington Street, 171 Montreal Road, 367 Poulin Avenue and 306 Rideau Street in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (60 employees in unit) (Having regard to the agreement of the parties)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0008-95-R: Christian Labour Association of Canada Construction Workers Local 150 (Applicant) v. Sand-Mark Sheet Metal Limited (Respondent) v. Sheet Metal Workers' International Association, Local 537 (intervenor)

Unit: "all certified sheet metal journeymen and registered apprentices employed in the ICI sector by Sand-Mark Sheet Metal Limited in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen, persons above the rank of non-working foreman, and office and clerical staff" (5 employees in Unit) (Having regard to the agreement of the parties)

0270-95-R: Christian Labour Association of Canada (Applicant) v. Megatech Electrical Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 586 (Intervener)

Unit: "all journeymen electricians and electricians' apprentices in the employ of Megatech Electrical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, and in all other sectors of the construction industry, excluding the residential sector, in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots, excluding segregated ballots, cast by persons whose names appear on	
voters' list	1
Number of segregated ballots cast by persons whose names appear on voters' list	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0041-95-R: International Association of Machinists and Aerospace Workers (Applicant) v. Quill Corporation Canada Limited (Respondent)

Unit: "all employees of Quill Corporation Canada Limited in the City of Mississauga in the Regional Municipality of Peel, save and except forepersons, persons above the rank of foreperson, office and clerical staff" (18 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	2

Applications for Certification Dismissed Without Vote

3742-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. C.F.M. Inc. (Respondent) v. Olsten Services Limited (Intervener)

0156-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gisborne Design Services Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

0933-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Impact Building Maintenance Services Limited (Respondent)

1152-95-R: Teamsters Local Union No. 419 (Applicant) v. Supply Chain Management Inc. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

4559-94-R: HESEU Hospitality Employees, Service Employees Union of Canada (Applicant) v. Toronto Airport Hilton International (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener)

Unit #1: "all employees of the responding party in the City of Mississauga save and except supervisors, persons above the rank of supervisor, office, sales, accounting and front-desk staff, persons supplied to the responding party by a contract personnel agency and students employed during the school vacation period" (135 employees in unit) (Clarity Note)

Number of names of persons on revised voters' list	149
Number of persons who cast ballots	118
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	28
Number of ballots marked in favour of intervener	76
Number of ballots segregated and not counted	8

0048-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Cold Springs Farm Limited (Respondent) v. Cold Springs Farm Employees' Association, The Canadian Union of Operating Engineers and General Workers (Interveners)

Unit #1: "all employees of Cold Springs Farm Limited in the Town of Thamesford save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff; students employed during the school vacation period and persons covered by existing collective bargaining relationships with Cold Spring Farms Limited in its pork plant operations." (339 employees in unit)

Number of persons who cast ballots	225
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	99
Number of ballots marked in favour of intervener	122

0167-95-R: Canadian Union of Public Employees (Applicant) v. Saint Elizabeth Health Care (Respondent)

Unit #1: "all office and clerical employees of Saint Elizabeth Health Care in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor." (59 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	62
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	62
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	34

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

4395-94-R: De La Salle College Teachers' Association (Applicant) v. De La Salle College "Oaklands" (Respondent) v. Group of Employees (Objectors)

Unit: "all teachers employed by De La Salle College "Oaklands" in the Municipality of Metropolitan Toronto, save and except Principal and Dean and persons above the rank of Principal and Dean," (22 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	15
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	9

4621-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Quinterra Property Maintenance Inc. (Respondent)

Unit: "all employees of Quinterra Property Maintenance Inc. at 277 Front Street West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (13 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	11
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	8

0009-95-R: United Steelworkers of America (Applicant) v. Big Sho Foods c.o.b. as Tim Hortons (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Big Sho Foods c.o.b. as Tim Hortons in the County of Simcoe, save and except supervisors and persons above the rank of supervisor" (24 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose	e names appear on
voter's list	11
Number of segregated ballots cast by persons whose names appear of	n voter's list 1
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

2659-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 737835 Ontario Limited c.o.b. as D.C. Services (Respondent)

4064-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853 (Applicant) v. United Fire Protection Systems Inc. (Respondent)

4623-94-R; 4624-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 (Applicant) v. S.I.G. Mechanical Services Ltd. (Respondent)

0093-95-R: Labourers' International Union of North America, Local 527 (Applicant) v. Permacon Ottawa (Respondent)

0301-95-R: Christian Labour Association of Canada Construction Workers Local 150 (Applicant) v. Sand-Mark Sheetmetal Limited (Respondent) v. Sheet Metal Workers' International Association, Local 30 (Intervener)

0413-95-R: Iwa-Canada, Local 2693 (Applicant) v. ICS, Insurance Courier Services (Respondent)

0430-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Nelmar Drywall (Respondent) v. International Brotherhood of Painters and Allied Trades, Local 1891, International Brotherhood of Painters and Allied Trades, District Council 46, Toronto - Central Ontario Building and Construction Trades Council (Interveners)

0464-95-R: Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC (Applicant) v. Libbey Canada Inc. (Respondent)

0606-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. 517739 Ontario Ltd. c.o.b. as Rolan Plumbing (Respondent)

0644-95-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. The Board of Governors of the University of Toronto (Respondent)

0645-95-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters (Applicant) v. Ottawa Central Laundry Transport Ltd. (Respondent)

0681-95-R: United Food & Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. 928598 Ontario Inc. (Respondent) v. Group of Employees (Objectors)

0682-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 715241 Ontario Limited c.o.b. as Hyde Park Concrete Co. (Respondent)

0776-95-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Weston Bakeries Ltd. (Respondent)

1089-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States Canada and its Local 508 (Applicant) v. Gisborne Construction (1985) Ltd. and Gisborne Design Services Ltd. (Respondents) v. Christian Labour Association of Canada (Intervener)

1128-95-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Bay Bloor Executive Suites (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1379-94-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. The Expositor, a Division of Southam Inc. (Respondent) (Granted)

3402-94-R: Graphic Communications International Union, Local 500M (Applicant) v. Arthurs-Jones Lithographing Ltd. (Respondent) (*Granted*)

3693-94-R; **3812-94-R**; **3814-94-R**: United Food and Commercial Workers International Local 175 (Applicant) v. Zellers Inc. (Respondent) (*Granted*)

4322-94-R: Canadian Union of Public Employees, Local 1238 (Applicant) v. Kent County Board of Education (Respondent) (*Granted*)

0567-95-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Elgin County Roman Catholic Separate School Board (Respondent) (*Granted*)

0605-95-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Pembroke Observer (Respondent) (*Withdrawn*)

0634-95-R: Canadian Union of Public Employees (Applicant) v. Port Colborne General Hospital (Respondent) (*Granted*)

0811-95-R: Ontario Public Service Employees Union (Applicant) v. Thunder Bay Regional Hospital (Respondent) (*Granted*)

0947-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. General Electric Canada Inc. (Respondent) (Granted)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1997-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Northdale Contractors Inc. and Lambeth Concrete and the Operative Plasterers' and Cement Masons' International Association, Local 598 (Respondent) (*Granted*)

2879-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Dom-Mar Electric Ltd.

- and Zenith Electric Limited, 514421 Ontario Limited, c.o.b. as Profile Electric and 514421 Ontario Limited (Respondents) (Endorsed Settlement)
- 1070-94-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, Labourers' International Union of North America, Local 491, Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Guy F. Atkinson Holdings Ltd./Gestion Guy F. Atkin Son Ltée, Commonwealth Construction Company Limited, Commonwealth Construction Company (1985) Limited and Commonwealth Pacific Consultants Limited (Respondents) (*Granted*)
- 1926-94-R; 1927-94-R; 1928-94-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Diamond Taxicab Association (Toronto) Limited, et al (Respondents); Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Associated Toronto Taxi-Cab Co-Operative Limited et al (Respondents); Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Applicant) v. Metro Cab Company Limited et al (Respondents) (*Granted*)
- **1930-94-R:** Sheet Metal Workers' International Association Local 47 (Applicant) v. R.J. Nicol Construction (1975) Limited and Revay and Associates Limited and The Laurentian Casualty Company of Canada (Respondents) (*Withdrawn*)
- 3385-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1034113 Ontario Limited, c.o.b. as Lucky Carpentry and Frato Carpentry and Williams Carpentry Ltd. (Respondents) (Withdrawn)
- **3464-94-R:** International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Solarlite Installations Inc. and Walltech Architectural Products Inc. (Respondents) (*Withdrawn*)
- **3667-94-R:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Mediro Wrought Iron Limited and Fabris Iron Works Inc. (Respondents) (*Withdrawn*)
- **3946-94-R:** Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Diamond Mechanical Contractors Limited, P.I. Mechanical Limited (Respondents) (*Terminated*)
- **4653-94-R:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 (Applicant) v. Windsor Plastic Products Ltd., Pegasus Plastics Inc. (Respondents) (*Endorsed Settlement*)
- 0160-95-R; 0162-95-R: Labourers' International Union of North America, Local 1081 (Applicant) v. 1011334 Ontario Ltd. (Excel Enterprises) and 1066695 Ontario Inc. (Standard Masonry) (Respondents); International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. 1011334 Ontario Ltd. (Excel Enterprises) and 1066695 Ontario Inc. (Standard Masonry) (Respondents) (Endorsed Settlement)
- **0593-95-R:** Skarlan Waterproofing Inc., and Skarlan Enterprises Limited (Applicants) v. Local Union 47 Sheet Metal Workers International Association (Respondent) (*Granted*)
- **0854-95-R:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Construction Val-Po Enr and Acoustic Inter Enr. (Respondents) (*Endorsed Settlement*)
- **0899-95-R:** International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. York Lathing Inc., York Lathing & Acoustics Ltd., York Lathing & Drywall Ltd. (Respondents) (*Endorsed Settlement*)
- **0909-95-R:** International Union of Bricklayers and Allied Craftsmen Local 23, Sarnia, Ontario (Applicant) v. Jim's Masonry 789256 Ontario Ltd. (Respondent) (*Dismissed*)

0976-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Fortese Concrete Ltd. and J.N.F. Concrete Ltd. (Respondents) (Withdrawn)

SALE OF A BUSINESS

1997-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Northdale Contractors Inc. and Lambeth Concrete and the Operative Plasterers' and Cement Masons' International Association, Local 598 (Respondent) (*Granted*)

2879-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Dom-Mar Electric Ltd. and Zenith Electric Limited, 514421 Ontario Limited, c.o.b. as Profile Electric and 514421 Ontario Limited (Respondents) (*Endorsed Settlement*)

1070-94-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, Labourers' International Union of North America, Local 491, Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Guy F. Atkinson Holdings Ltd./Gestion Guy F. Atkin Son Ltée, Commonwealth Construction Company Limited, Commonwealth Construction Company (1985) Limited and Commonwealth Pacific Consultants Limited (Respondents) (*Granted*)

1930-94-R: Sheet Metal Workers' International Association Local 47 (Applicant) v. R.J. Nicol Construction (1975) Limited and Revay and Associates Limited and The Laurentian Casualty Company of Canada (Respondents) (Withdrawn)

3385-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1034113 Ontario Limited, c.o.b. as Lucky Carpentry and Frato Carpentry and Williams Carpentry Ltd. (Respondents) (Withdrawn)

3464-94-R: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Solarlite Installations Inc. and Walltech Architectural Products Inc. (Respondents) (*Withdrawn*)

3667-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Mediro Wrought Iron Limited and Fabris Iron Works Inc. (Respondents) (*Withdrawn*)

3946-94-R: Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Diamond Mechanical Contractors Limited, P.I. Mechanical Limited (Respondents) (*Terminated*)

4652-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada and its Local 195 (Applicant) v. Windsor Plastic Products Ltd., Pegasus Plastics Inc. (Respondents) (*Endorsed Settlement*)

0160-95-R; **0162-95-R**: Labourers' International Union of North America, Local 1081 (Applicant) v. 1011334 Ontario Ltd. (Excel Enterprises) and 1066695 Ontario Inc. (Standard Masonry) (Respondents); International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. 1011334 Ontario Ltd. (Excel Enterprises) and 1066695 Ontario Inc. (Standard Masonry) (Respondents) (*Endorsed Settlement*)

0593-95-R: Skarlan Waterproofing Inc., and Skarlan Enterprises Limited (Applicants) v. Local Union 47 Sheet Metal Workers International Association (Respondent) (*Granted*)

0854-95-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Construction Val-Po Enr and Acoustic Inter Enr. (Respondents) (*Endorsed Settlement*)

0860-95-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Robin's Foods Inc. at 465 memorial Avenue in Thunder Bay and Robin's Foods at 439 Memorial Avenue and 465 Memorial Avenue in Thunder Bay (Respondent) (*Endorsed Settlement*)

0899-95-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. York Lathing Inc., York Lathing & Acoustics Ltd., York Lathing & Drywall Ltd. (Respondents) (*Endorsed Settlement*)

0909-95-R: International Union of Bricklayers and Allied Craftsmen Local 23, Sarnia, Ontario (Applicant) v. Jim's Masonry 789256 Ontario Ltd. (Respondent) (*Dismissed*)

0976-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Fortese Concrete Ltd. and J.N.F. Concrete Ltd. (Respondents) (Withdrawn)

1000-95-R: Lanark Furniture Corporation and Kroehler Furniture Inc. (Applicant) v. United Steelworkers of America and its Local 400U and Labourers' International Union of North America, Local 183 (Respondents) (Withdrawn)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

0406-95-R: Betts Cleaning Specialists Ltd. (Applicant) v. Labourers International Union of North America, Local 183 (Respondent) (*Endorsed Settlement*)

0859-95-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Robin's Foods Inc. at 465 Memorial Avenue in Thunder Bay and Robin's Foods at 439 Memorial Avenue and 465 465 Memorial Avenue in Thunder Bay (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4354-94-R: Craig Connors (Applicant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union Number 172 Restoration Steeplejacks (Respondent) v. Steeplejack & Masonry Restoration Contractors Association, Maxim Group General Contracting Limited (Interveners)

Unit: "all employees, save and except those above the rank of working foreman" (0 employees in unit) (Granted)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	. 7
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

4406-94-R: John Warwood (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions, Labourers' International Union of North America, Local 1059 and Local 1081 (Respondent) v. Maurice Pickard - Pickard Construction (Intervener)

Unit: "all construction labourers engaged in the construction industry employed by the employer in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin and the County of Grey, in the province of Ontario, save and except surface heavy equipment operators, non-working foremen and persons above the rank of non-working foremen" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

4485-94-R: Donald Epp (Applicant) v. International Association of Heat & Frost Insulators & Asbestos

Workers, and The International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Respondent) v. Eve Sigfrid, carrying on business as D & E Insulation (Intervener) (Dismissed)

4522-94-R: Jurgen Bode (Applicant) v. Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference For Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562 (Respondent) v. E.K. Purdy Ltd. (Intervener)

Unit: "all journeymen and apprentice sheet metal workers in the employ of E.K. Purdy Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman" (1 employee in unit) (*Granted*)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	0
Number of ballots segregated and not counted	0

4581-94-R: Robert H. Jones (Applicant) v. The International Brotherhood of Electrical Workers (Respondent) v. 635066 Ontario Ltd. c.o.b. Diversified Electro-Technical Services (Intervener) (Dismissed)

0121-95-R: Wilson Elliott (Applicant) v. International Union of Bricklayers and Allied Craftsmen (Respondent) v. D & D Masonry (Brantford) Ltd. (Intervener)

Unit: "all bricklayers, stone masons and plasterers and their respective apprentices, improvers and working foremen in the employ of D & D Masonry (Brantford) Ltd. in the Province of Ontario, in the industrial, commercial and institutional sector of the construction industry" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

0172-95-R: Darren Simpson (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondent) v. Thermotek Insulations Inc. (Intervener)

Unit: "all journeymen and apprentice insulators and asbestos workers employed by Thermotek Insulations Inc. in the industrial, commercial and institutional sector of the construction industry, in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (Dismissed)

0205-95-R: Michael Lindgren on behalf of himself (Applicant) v. International Brotherhood of Electrical Workers Local Union 353 (Respondent) v. A.P.C.I. Communications Inc. (Intervener)

Unit: "all foremen, journeymen wiremen, instrumentation electricians, apprentices, journeymen linemen splicers, apprentice linemen splicers, groundman/equipment operators, goundmen/drivers, groundmen, utility men and foresters performing work within the acknowledged jurisdiction of the union as defined in section 139(2) of the Ontario Labour Relations Act all employees of A.P.C.I. Communications Inc. engaged in the installation, maintenance, repair or service of all telephone interconnect and data systems including, but not restricted to, input data or voice lines, interface lines, acquisition lines, data reporting lines, local area networks video distribution and related peripheral equipment for the above" (5 employees in unit) (Dismissed)

0210-95-R: Adam Yalonetsky (Applicant) v. Canadian Union of Professional Security Guards v. Northwest Protection Services Ltd. (Intervener)

Unit: "all employees of Northwest Protection Services Ltd. working at 77 Carlton Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

0216-95-R: Kevin Smith and Clifford Wilkinson (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Elirpa Construction and Materials Limited (Intervener) (*Withdrawn*)

0237-95-R: Kevin Smith and Clifford Wilkinson (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Elirpa Construction and Materials Limited (Intervener) (*Withdrawn*)

0324-95-R: Carl Dunn (5 Names Deleted for Confidentiality) (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Dismissed*)

0385-95-R: Michael George Deck (Applicant) v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, The International Brotherhood of Electrical Workers, The IBEW Construction Council of Ontario, Local Union 105 of the International Brotherhood of Electrical Workers, Local Union 115, International Brotherhood of Electrical Workers, Local Union 203, International Brotherhood of Electrical Workers, Local Union 353, International Brotherhood of Electrical Workers, Local Union 350, International Brotherhood of Electrical Workers, Local Union 530, International Brotherhood of Electrical Workers, Local Union 586, International Brotherhood of Electrical Workers, Local Union 586, International Brotherhood of Electrical Workers, Local Union 804, International Brotherhood of Electrical Workers, Local Union 894, International Brotherhood of Electrical Workers, Local Union 1739 (Respondents) v. Vankesteren Electric (Intervener) (Withdrawn)

0435-95-R: Cecil Small (Applicant) v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) (*Withdrawn*)

0471-95-R: Ivan Urek (Applicant) v. International Brotherhood of Electrical Workers Locals 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, 1739 and International Brotherhood of Electrical Workers Construction Council of Ontario (Respondents)

Unit: "all electricians and electrician's apprentices in the employ of Drago Petrina Electrical Contractor Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Granted*)

0492-95-R: Ivan Urek (Applicant) v. International Brotherhood of Electrical Workers, Local 105 (Respondent)

Unit: "all electricians and electrician's apprentices in the employ of Drago Petrina Electrical Contractor Limited in the residential sector of the construction industry in the geographic jurisdiction of Local 105 Hamilton: Brant, Norfolk, Wentworth Counties and that portion of Oxford County South of a straight east to west line connecting the Town Line Road and Newell Road in the Town of Tillsonburg: the Townships of Seneca, Rainham, North Cayuga, South Cayuga, Oneida and Walpole in Haldimand County, and that portion of Halton County west of the Eight Concession Line and south of Highway 401 in the Province of Ontario" (2 employees in unit) (*Granted*)

0494-95-R: Moira Buckham (Applicant) v. Retail, Wholesale Canada, Canadian Service Sector, Division of the United Steelworkers of America, Local 448 (Respondent) v. Greenhills Corporation (Intervener) (Withdrawn)

0826-95-R: Barry Cox (Applicant) v. Labourers International Union of North America Local 1089 (Respondent) v. Oakdale Cleaners (Intervener)

Unit: "all employees of Oakdale Cleaners and Maintenance Ltd. employed in the City of Sarnia, save and except non-working forepersons and persons above the rank of non-working foreperson" (2 employees in unit) (Dismissed)

0994-95-R: Robert Snow (Applicant) v. Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America Local 414 (Respondent) v. Woodstock 401 Service Centre Inc. (Intervener) (Withdrawn)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

1902-94-U: United Steelworkers of America (Applicant) v. Nelson Quarry Company (Respondent) (*Endorsed Settlement*)

4102-94-M: Children's Aid Society of London and Middlesex (Applicant) v. Ontario Public Service Employees Union, and its Local 116 (Respondent) (*Withdrawn*)

4680-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. 969774 Ontario Limited c.o.b. as Elgin Construction (Respondent) (*Dismissed*)

0862-95-U: Canadian Union of Public Employees Local 133 (Applicant) v. Niagara Falls Humane Society (Respondent) (*Withdrawn*)

0986-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Cuddy Food Products (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

4034-93-U: Angelo Solimine, Tony Simone, Giuseppe Riggello, Rocco Belligero, Mario Constantino and Steve Jost (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 (Respondent) v. Weston Bakeries Limited (Intervener) (*Dismissed*)

0452-94-U: Denise Lynn Goodale (Applicant) v. Ontario Nurses' Association (Local 70), Hamilton Civic Hospital (General Division) (Respondent) v. Hamilton Civic Hospitals (Intervener) (*Withdrawn*)

0608-94-U: Champuben Patel (Applicant) v. Amalgamated Clothing and Textile Workers Union, Local 551, CLC, AFL-CIO and Levi Strauss & Co. (Canada) Inc. (Respondents) (*Dismissed*)

0668-94-U: William J. Webster (Applicant) v. Canadian Union of Public Employees and its Local 534, Corporation of the Town of Espanola Ontario (Respondents) (*Dismissed*)

1366-94-U: IWA Canada, Local 2693 (Applicant) v. Avenor Inc. (Respondent) (Withdrawn)

1960-94-U: Nelson Quarry Company (Applicant) v. United Steelworkers of America (Respondent) v. Communications, Energy and Paperworkers Union of Canada, Local Union No. 494 (Intervener) (Dismissed)

2448-94-U: Southern Ontario Newspaper Guild and Frederick Stickle (Applicants) v. The Belleville Intelligence, a Division of Thomson Newspapers Company Limited (Respondent) (*Withdrawn*)

2451-94-U: United Food and Commercial Workers International Union (Applicant) v. BABN Technologies Inc. (Respondent) (*Withdrawn*)

2553-94-U: Canadian Union of Public Employees Local 1883 (Applicant) v. Regional Municipality of Waterloo (Respondent) (*Withdrawn*)

2652-94-U: Metropolitan Toronto Road Builders Association ("Association") (Applicant) v. Labourers'

International Union of North America, Local 183, Teamsters Local Union 230, The International Union of Operating Engineers, Local 793 (Respondents) (Withdrawn)

2672-94-U: Canadian Union of Operating Engineers and General Workers (Applicant) v. Interactive Media Group (Canada) Ltd. (Respondent) (*Withdrawn*)

2964-94-U: International Association of Machinists and Aerospace Workers Local Lodge 1542 (Applicant) v. Boeing Canada Technology (Arnprior Division) (Respondent) (*Terminated*)

3015-94-U: United Food & Commercial Workers International Union, Local Union 175 (Applicant) v. Banlake Associates Ltd. c.o.b. as Bancroft I.G.A. (Respondent) (Withdrawn)

3037-94-U: Dianne Robinson et al (Applicant) v. Local 222 Canadian Autoworkers Union (Respondent) v. General Motors of Canada Limited (Intervener) (*Granted*)

3285-94-U: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Brick Warehouse Corporation (Respondent) (Withdrawn)

3661-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. 737835 Ontario Limited c.o.b. as DC Services (Respondent) (*Withdrawn*)

4262-94-U: Highline Produce Limited (Applicant) v. United Food and Commercial Worker International Union (Respondent) v. Theresa Sarkis (Intervener) (*Dismissed*)

4264-94-U: Peggy McLean (Applicant) v. Ontario Nurses Association Local 92 and Orillia Soldiers Memorial Hospital (Respondents) (*Withdrawn*)

4274-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

4312-94-U: Carlos Garcia (Applicant) v. United Food and Commercial Workers International Union, Local 393W (Respondent) v. Coca-Cola Bottling Ltd. (Intervener) (Dismissed)

4433-94-U: Betts Cleaning Specialists Ltd. (Applicant) v. The Quality Maintenance Group 1051013 Ontario Limited, and David Constancio (Respondent) v. Labourers International Union of North America, Local 183 (Intervener) (*Endorsed Settlement*)

4583-94-U: United Food and Commercial Workers International Union (Applicant) v. Highline Produce Limited (Respondent) (*Withdrawn*)

4601-94-U: Canadian Auto Workers Local 523 (Applicant) v. Page Hersey Works (Respondent) (Withdrawn)

4636-94-U: United Steelworkers of America (Applicant) v. O.S. Plastics Inc. (Respondent) (Withdrawn)

4656-94-U: Cecelia Dianne Sharpe (Applicant) v. Canadian Union of Public Employees, Local 109 and Canadian Union of Public Employees (Respondents) (*Withdrawn*)

4662-94-U: David E. Smith (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Crown in the Right of Ontario represented by Management Board Secretariat (Intervener) (*Dismissed*)

4669-94-U: International Union of Operating Engineers, Local 796 (Applicant) v. Oshawa General Hospital (Respondent) (*Withdrawn*)

4671-94-U: Victoria Burgess (Applicant) v. CUPE Local 3501 (Respondent) (Withdrawn)

0022-95-U: Daniel Arbour (Applicant) v. Canadian Service Sector Division of the United Steelworkers of America (Respondent) v. City Wide Taxi (Intervener) (Withdrawn)

0070-95-U: Labourers International Union of North America, Local 183 (Applicant) v. Betts Cleaning Specialists Ltd. (Respondent) (*Endorsed Settlement*)

0089-95-U: Ron Rothney (Applicant) v. Cla-Val Association (Respondent) (Dismissed)

0141-95-U: Jeanine M. Anderson (Applicant) v. London District Service Workers' Union, Local 220, Grand River Hospital Corporation (Respondents) (*Withdrawn*)

0196-95-U: Ontario Public Service Employees Union (Applicant) v. St. Thomas/Elgin Unemployed Help Centre (Respondent) (*Withdrawn*)

0207-95-U: Nicole L. Kuyer (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union and Meridian Accurcast Ltd. (Respondents) (*Withdrawn*)

0235-95-U: Chris Petlichkov (Applicant) v. Metropolitan Toronto Civic Employees Union Local 43 (Respondent) v. The Corporation of the City of Toronto (Intervener) (*Withdrawn*)

0277-95-U: Amalgamated Clothing and Textile Workers Union, Local 1719 (Applicant) v. Lear Seating Canada Limited and Canadian Lear Workers' Union (Respondents) (*Dismissed*)

0278-95-U: Labourers' International Union of North America, Local 183 (Applicant) v. Live Entertainment of Canada, Inc. (Respondent) (*Withdrawn*)

0308-95-U: Dany Jimenez and Jose Jimenez (Applicant) v. Rodam Manufacturing (Canada) Ltd. (Respondent) (Granted)

0329-95-U: Mrs. Sudarshan Sharma (Applicant) v. Textile Processors, Professional and Technical Employees International Union, Local 351 (Respondent) v. Keanall Industries Inc. (Intervener) (*Withdrawn*)

0359-95-U: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Sand-Mark Sheet Metal Ltd., Christian Labour Association of Canada Construction Workers', Local 150 (Respondents) (*Withdrawn*)

0414-95-U: Ivan E. Jones (Applicant) v. Teamsters Local Union No. 230 Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers affiliated with the International Brotherhood of Teamsters (Respondent) v. John Ziner Lumber Ltd. (Intervener) (*Withdrawn*)

0420-95-U: Lillian Gerber (Applicant) v. Walbar Canada Inc., United Steelworkers of America, Local 9236 (Respondents) v. Gradimir Medjedovic (Intervener) (*Withdrawn*)

0440-95-U: Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters (Applicant) v. Diplomat Coffee System (Respondent) (*Withdrawn*)

0462-95-U: IWA-Canada, Local 1-2693 (Applicant) v. Isadore Roy Limited (Respondent) (Withdrawn)

0486-95-U: Richard P. Alpe (Applicant) v. The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local #222 CAW, Oshawa, Ontario (Respondents) (*Withdrawn*)

0518-95-U: William Joseph Erickson (Applicant) v. United Food and Commercial Workers Union, Local 743 and Quality Meat Packers Ltd. (Respondents) (*Withdrawn*)

0519-95-U: Lisa Belfry, Bridget Leslie, Gail Legate, Debbie Wingrove, and Tammie Hyde (Applicant) v. Terry Baxter (Staff Advisor O.P.S.E.U.), Bev Toivonen (President, Local 358), Carla Lloyd (Vice-President, Local 358) (Respondent) (*Withdrawn*)

0555-95-U: The Canadian Union of Public Employees and its Local 2119 (Applicant) v. Perth and Smiths Falls District Hospital (Respondent) (*Withdrawn*)

0572-95-U: Ontario Pipe Trades Council (Applicant) v. Nekison Engineering & Contractors Ltd., R.J. Black & Associates Limited, P.I. Mechanical Limited, Ivo Poklar, Rabbito Mechanical Limited, Nekison Employees Association, Vito Rabbito (Respondents) (*Terminated*)

0592-95-U: The Canadian Union of Public Employees and its Local 3703 (Applicant) v. Rideau Place Retirement Centre (Respondent) (*Withdrawn*)

0596-95-U: United Food and Commercial Workers' International Union AFL-CIO-CLC, Local 1000A (Applicant) v. Sobey's Inc. (Respondent) (*Withdrawn*)

0614-95-U: The Ontario Public Service Employees Union (Applicant) v. Cara House - Agape Group Homes (Respondent) (*Withdrawn*)

0616-95-U: Roger Jodoin (Applicant) v. Teamsters Local Union 91 (Respondent) (Withdrawn)

0638-95-U; 0639-95-U: United Steelworkers of America (Applicant) v. The Township of Williamsburg (Respondent) (Withdrawn)

0642-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Alltype Storage Systems (Respondent) (*Withdrawn*)

0647-95-U: Firoz Ramji (Applicant) v. Howard Johnson Plaza Hotel Downtown Toronto (Respondent) (Withdrawn)

0650-95-U: Labourers International Union of North America, Local 837 (Applicant) v. Ogden Allied Services Inc. (Respondent) (*Withdrawn*)

0653-95-U: Ron Fitzpatrick (Applicant) v. Local Union No. 1005, United Steelworkers of America (Respondent) v. Stelco Inc., Hilton Works (Intervener) (Withdrawn)

0705-95-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Canadian Medical Laboratories Limited (Respondent) (*Withdrawn*)

0718-95-U: Ontario Public Service Employees Union, Local 529 (Applicant) v. York Detention Centre, Ministry of Community & Social Services; Ms. Laura Arndt, South Unit Supervisor, York Detention Center, Ministry of Community & Social Services (Respondent) (Withdrawn)

0730-95-U: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Elta Gas Services Ltd. (Respondent) (Endorsed Settlement)

0760-95-U: Ontario Public Service Employees Union (Applicant) v. Addiction Research Foundation (Respondent) (Withdrawn)

0790-95-U: Dwight J. Sernoskie (Applicant) v. United Plant Guard Workers of America (Respondent) (Withdrawn)

0792-95-U: Donald J. LeBlanc (Applicant) v. Ontario English Catholic Teachers Association, York Catholic Teachers, York Region Roman Catholic Separate School Board (Respondents) (Dismissed)

0814-95-U: Mr. Jeffrey William Landry (Applicant) v. United Food and Commercial Workers International Union Local 175 and 663 Mr. Dan Onichuk Mr. Luc Lacelle (Respondent) (*Withdrawn*)

0819-95-U; 0820-95-U: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Robin's Foods Inc. (Respondent) (*Endorsed Settlement*)

0856-95-U: Thomas G. Newman (Applicant) v. Harold O. Ramsli (Respondent) v. Daymond Building Products (Intervener) (*Withdrawn*)

0865-95-U: Paul Mathurin (Applicant) v. The Independent Canadian Transit Union, Local 9 and Deanna Gostic Vice President (Respondent) (Withdrawn)

0872-95-U: Jim Galuska (Applicant) v. The Hamilton-Wentworth Roman Catholic Separate School Board and Labourers' International Union of North America, Local 837 (Respondents) (*Withdrawn*)

0879-95-U: All bargaining unit (cleaning staff) working with the Contractor Concorde Maintenance Corp. in Ministry of Transportation, (Applicants) v. Labourers' International Union of North America, [Local 183] Mr. Tony Dionisio (President); Mr. Moses Cordejre President of Concord Maintenance Corp. (Respondents) (*Dismissed*)

0917-95-U: United Food and Commercial Workers International Union, Local 175/633 (Applicant) v. Michael York Inc. c.o.b. as Campbellford IGA and Michael York (Respondent) (*Withdrawn*)

0927-95-U: Hector Dedivitris (Applicant) v. TRW Canada Limited, Linkage & Suspension (Respondent) (Dismissed)

0952-95-U: Ontario Public Service Employees Union (Applicant) v. The Crest Centre (Meadowcrest) Inc. (Respondent) (*Withdrawn*)

0972-95-U: Gurdip Binning (Applicant) v. Ali Shah and Ravinder Gerwal (Respondents) (Dismissed)

0980-95-U: George Hines (Applicant) v. The Municipality of Metropolitan Toronto Parks & Property Eastern District (Respondent) (*Dismissed*)

0982-95-U: International Brotherhood of Electrical Workers Local 115 (Applicant) v. Division 16 Electrical Services (Respondent) (*Withdrawn*)

1019-95-U: Patricia Mae Gordon (Applicant) v. Women In Transition Inc. and Service Employees' International Union, Local 204 (Respondents) (*Dismissed*)

1070-95-U: Labourers' International Union of North America, Local 506 (Applicant) v. Durr Industries Incorporated and Toronto-Central Ontario Building and Construction Trades Council (Respondents) (Withdrawn)

1072-95-U: Edward Kennedy, William MacDonald (Applicants) v. Local 249 Carpenters' Union (Respondent) (Dismissed)

1087-95-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508, and Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Gisborne Construction (1985) Ltd. and Gisborne Design Services Ltd. (Respondents) (*Withdrawn*)

1095-95-U: Service Employees Union Local 268 affiliated with the S.E.I.U., AF. of L., C.I.O., and C.L.C. (Applicant) v. Robin's Foods Inc. (Respondent) (*Endorsed Settlement*)

1104-95-U: United Steelworkers of America (Applicant) v. Wirral Manufacturing Ltd. (Respondent) (Withdrawn)

1129-95-U: United Steelworkers of America (Applicant) v. Via Personnel Services Ltd. (Respondent) (Withdrawn)

1145-95-U: Andy Robertson (Applicant) v. The Crown in Right of Ontario as Represented by the Ministry of Community and Social Services (Respondent) (Dismissed)

1181-95-U: Esteban Gomez (Applicant) v. Teamsters Local Union 938 (Respondent) (Withdrawn)

1187-95-U: Douglas James Sawdon (Applicant) v. General Motors of Canada and C.A.W. Local 222 (Respondents) (Dismissed)

1219-95-U: Ibrahim Abdou (Applicant) v. Concorde Maintenance Corp. and Local 183 Labourers International Union (Respondents) (*Dismissed*)

1220-95-U: Luisa J. Esposito (Applicant) v. Labourers International Union of North America (Local 183) and Concorde Maintenance Corp. (Respondents) (Dismissed)

1221-95-U: Emad Loza (Applicant) v. Labourers International Union of North America (Local 183) and Concorde Maintenance Corp. (Respondents) (Dismissed)

1243-95-U: Frederick D'Souza (Applicant) v. Ontario Guard Services Inc. (Respondent) (Dismissed)

1278-95-U: Wayne Griffin (Applicant) v. C.U.P.E. Local 5 (Respondent) (Dismissed)

APPLICATION FOR INTERIM ORDER

0821-95-M; 1096-95-M: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Robin's Foods, Inc. (Respondent) (Endorsed Settlement)

0916-95-M: United Food and Commercial Workers International Union, Local 175/633 (Applicant) v. Michael York Inc. c.o.b. as Campbellford IGA and Michael York (Respondents) (Withdrawn)

0983-95-M: International Brotherhood of Electrical Workers Local 115 (Applicant) v. Division 16 Electrical Services (Respondent) (*Withdrawn*)

1001-95-M: Lanark Furniture Corporation and Kroehler Furniture Inc. (Applicant) v. United Steelworkers of America and its Local 400U and Labourers' International Union of North America, Local 183 (Respondents) (Dismissed)

1130-95-M: United Steelworkers of America (Applicant) v. Via Personnel Services Ltd. (Respondent) (Granted)

1179-95-M: Amalgamated Transit Union, Local 1587 (Applicant) v. CAN-AR Transit Services, Division of Tokmakjian Limited (Respondent) (Withdrawn)

1255-95-M: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Niagara Mechanical Contractors, Leslie Brothers Inc., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666 (Respondents) (Dismissed)

APPLICATIONS FOR CONSENT TO PROSECUTE

1088-95-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508, and Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Gisborne Construction (1985) Ltd. and Gisborne Design Services Ltd. (Respondents) (Withdrawn)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0667-95-M: The Textile Rental Institute of Ontario (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union, Local 351 (Respondent) (*Granted*)

0668-95-M: The Textile Rental Institute of Ontario (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union, Local 351 (Respondent) (*Granted*)

0855-95-M: Columbia/MBF (Applicant) v. Laundry & Linen Drivers And Industrial Workers Union Local 847, (Respondent) (*Granted*)

FINANCIAL STATEMENT

0416-95-M: Bob Graham (Applicant) v. Retail, Wholesale Canada Canadian Service Sector Division of United Steelworkers of America Local 414 (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

0148-95-JD: Local 1832 International Brotherhood of Painters and Allied Trades (Applicant) v. District Council 46 International Brotherhood of Painters and Allied Workers (Respondent) (*Dismissed*)

1021-95-JD: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) and its Local 4268 (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent) (Withdrawn)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

4359-93-M: Service Employees Union Local 268, affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Geraldton District Hospital Incorporated (Respondent) (*Withdrawn*)

3863-94-M: The Professional Institute of the Public Service of Canada (Applicant) v. The Professional Institute Staff Association (Respondent) (*Withdrawn*)

0147-95-M: Office and Professional Employees International Union Local #26 (Applicant) v. Northern Credit Union Ltd. (Respondent) (*Terminated*)

0493-95-M: Service Employees Union, Local 183 (Applicant) v. Community Vision and Networking (Respondent) (Withdrawn)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2771-94-OH: Richmond Hill Professional Fire Fighters Association, I.A.F.F. Local 1957 (Applicant) v. The Corporation of the Town of Richmond Hill and Robert Kennedy (Respondent) (*Withdrawn*)

0386-95-OH: Thavendran Kandiah (Applicant) v. Brimell Toyota (Respondent) (Withdrawn)

0390-95-OH: Manuel V. Cunha (Applicant) v. Confed Realty Services Limited (Respondent) (Withdrawn)

0391-95-OH: Victor Jensen (Applicant) v. The Municipality of Metropolitan Toronto, The Transportation Department Yard Six (Respondent) (Withdrawn)

0425-95-OH: John Larsen (Applicant) v. Pristine Printing Inc. (Respondent) (Withdrawn)

CECBA - ESSENTIAL SERVICES (SEC. 36.1)

3878-94-M: Ontario Public Service Employees Union (Applicant) v. Crown in Right of Ontario - Office Administration Unit (Respondent) (Granted)

CONSTRUCTION INDUSTRY GRIEVANCES

1998-93-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Northdale Contractors Inc. (Respondent) (*Granted*)

2878-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Dom-Mar Electric Ltd. and Zenith Electric Limited, 514421 Ontario Limited, c.o.b. as Profile Electric and 514421 Ontario Limited (Respondents) (*Endorsed Settlement*)

0433-94-G: Sheet Metal Workers International Association, Local 537 (Applicant) v. The Electrical Power Systems Construction Association, Nanticoke Thermal Generating Station (Respondents) (*Withdrawn*)

0772-94-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Commonwealth Construction Company Limited and Commonwealth Pacific Consultants Limited (Respondents) v. Labourers' International Union of North America, Local 491, Labourers' International Union of North America, Ontario Provincial District Council (Interveners) (Granted)

1487-94-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Pinehurst Inc., Forest City Forming Ltd., Drewlo Construction Ltd. (Respondents) (Withdrawn)

1929-94-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. R.J. Nicol Construction (1975) Limited and Revay and Associates Limited and The Laurentian Casualty Company of Canada (Respondents) (Withdrawn)

2526-94-G: Metropolitan Toronto Road Builders Association ("Association") (Applicant) v. Labourers International Union of North America, Local 183, Teamsters Local Union 230, International Union of Operating Engineers, Local 793, ("Unions") (Respondents) v. Canadian Highways International (Intervener) (Withdrawn)

2723-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Locals 759 and 786 (Applicant) v. Northern Reinforcing Products Ltd. (Respondent) (*Endorsed Settlement*)

3143-94-G: Ontario Allied Construction Trades Council on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 880 (Applicant) v. Electrical Power Systems Construction Association (Respondent) (Withdrawn)

3386-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. 1034113 Ontario Limited, c.o.b. as Lucky Carpentry and Frato Carpentry and Williams Carpentry Ltd. (Respondents) (Withdrawn)

3465-94-G: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Solarlite Installations Inc. and Walltech Architectural Products Inc. (Respondents) (*Withdrawn*)

4091-94-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. J.R.M. Drywall Inc. (Respondent) (Withdrawn)

4283-94-G: Labourers' International Union of North America, Local 247 (Applicant) v. Capital Cutting & Coring Ltd. (Respondent) (*Endorsed Settlement*)

4372-94-G: Labourers' International Union of North America Local 183 (Applicant) v. Diamond Stone (Respondent) (Endorsed Settlement)

- **4378-94-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Eagle Bricklayers' Construction Ltd. (Respondent) (*Granted*)
- **4415-94-G:** Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Black & McDonald Limited (Respondent) (Withdrawn)
- **4417-94-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mallet Millwork Inc. (Respondent) (*Endorsed Settlement*)
- **4427-94-G:** The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambareri Construction Inc. (Respondent) (*Granted*)
- **4462-94-G:** Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Broom's Mechanical Contracting Limited (Respondent) (*Withdrawn*)
- **4615-94-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. H.C. Barker & Sons Ltd. (Respondent) (*Endorsed Settlement*)
- **0098-95-G:** A Council of Trades Unions acting on behalf of Labourers International Union of North America, Local 183 and Teamsters Local Union 230 (Applicant) v. Dufferin Construction Limited (Respondent) (*Granted*)
- **0159-95-G**; **0161-95-G**: Labourers' International Union of North America, Local 1081 (Applicant) v. 101134 Ontario Ltd. (Excel Enterprises) and 1066695 Ontario Inc. (Standard Masonry) (Respondents); International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. 101134 Ontario Ltd. (Excel Enterprises) and 1066695 Ontario Inc. (Standard Masonry) (Respondents) (*Endorsed Settlement*)
- **0281-95-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Condor Crane Services Inc. (Respondent) (*Endorsed Settlement*)
- **0457-95-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Sand-Mark Sheet Metal Ltd. (Respondent) (*Withdrawn*)
- **0478-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Casebridge Construction Limited (Respondent) (*Withdrawn*)
- **0483-95-G:** Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Brothers Drywall Ltd., Unique Drywall Ltd. and Unic Drywall Ltd. (Respondents) (*Withdrawn*)
- **0498-95-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. M.D. Contracting (Respondent) (*Endorsed Settlement*)
- **0599-95-G**; **0900-95-G**: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. York Lathing & Drywall Ltd., York Lathing & Acoustics Ltd. and York Lathing Inc. (Respondents) (*Endorsed Settlement*)
- **0627-95-G**; **0628-95-G**: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Barclay Tile and Carpet Ltd., Barclay Tile, Barclay Commercial Floors (Respondent) (*Endorsed Settlement*)
- **0630-95-G:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Q-Tech Limited 663925 Ontario Inc. (Respondent) (*Endorsed Settlement*)
- **0651-95-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Jay Electric Limited (Respondent) (*Endorsed Settlement*)

0690-95-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Lakeview Painting Contractors (1990) Ltd. (Respondent) (*Endorsed Settlement*)

0726-95-G: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Western Building Group Limited (Respondent) (Granted)

0728-95-G: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. J.S. Electric (1989) Ltd., J.S. Industrial Sales and Service Ltd. (Respondents) (Granted)

0735-95-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Wimpey Construction (Respondent) (Withdrawn)

0741-95-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. 696147 Ontario Inc. /Willowdale Masonry (Respondent) (*Endorsed Settlement*)

0743-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. W.C. Pietz Limited (Respondent) (*Endorsed Settlement*)

0749-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Metric Steel Erectors Ltd. (Respondent) (Endorsed Settlement)

0752-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. D & L Masonry (Respondent) (*Granted*)

0756-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Lucky Carpentry (Respondent) (Endorsed Settlement)

0768-95-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Mainway Industrial Installations Inc. (Respondent) (*Granted*)

0809-95-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Toronto Masonry (1986) Limited (Respondent) (Endorsed Settlement)

0810-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Eurowall Masonry Ltd. (Respondent) (*Withdrawn*)

0815-95-G: Labourers' International Union of North America, Local 491 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Commonwealth Construction Company Limited and Commonwealth Pacific Consultants Limited (Respondents) (*Granted*)

0817-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. D. Lafreniere Builders Ltd. (Respondent) (*Endorsed Settlement*)

0827-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ideal Railings Limited (Respondent) (Withdrawn)

0836-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Maple Drain & Concrete Inc. (Respondent) (Endorsed Settlement)

0845-95-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Nation Drywall Ltd. (Respondent) (*Withdrawn*)

0846-95-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. C&L Construction Limited (Respondent) (*Endorsed Settlement*)

- **0847-95-G:** The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Wood Systems (Division of 924183 Ontario Inc.) Carpenters & Builders (Respondent) (*Endorsed Settlement*)
- **0853-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Construction Val-Po Enr., Acoustic Inter Enr. (Respondents) (*Endorsed Settlement*)
- **0863-95-G:** Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Linjo Masonry Ltd./Acadian Bricklayers Ltd. (Respondent) (*Endorsed Settlement*)
- **0881-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. 1050443 Ontario Ltd. (Bright Stars Masonry) (Respondent) (*Withdrawn*)
- **0882-95-G:** Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rubican Interiors Limited (Respondent) (*Endorsed Settlement*)
- **0938-95-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jackson Lewis Company Inc. (Respondent) (*Endorsed Settlement*)
- **0940-95-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Printz Contracting Inc. (Respondent) (*Withdrawn*)
- **0951-95-G:** Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Ivan Masonry Ltd. (Respondent) (*Withdrawn*)
- **0975-95-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Fortese Concrete Ltd. and J.N.F. Concrete Ltd. (Respondents) (*Withdrawn*)
- **0978-95-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dalton Engineering and Construction Ltd. (Respondent) (*Withdrawn*)
- **1002-95-G:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Black & MacDonald Ltd. (Respondent) (*Withdrawn*)
- **1079-95-G:** International Union of Bricklayers and Allied Craftsmen Local #4 Ontario (Applicant) v. Ontario Masonry and Concrete (Respondent) (*Withdrawn*)
- **1080-95-G:** Labourers' International Union of North America Local 183 (Applicant) v. Sunlight Masonry Ltd. (Respondent) (*Granted*)
- 1085-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Con-Via Construction (Respondent) (Withdrawn)
- **1090-95-G:** The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 114585 Canada Ltée (Respondent) (*Endorsed Settlement*)
- **1112-95-G:** International Brotherhood of Painters and Allied Trades Local 1819 (Applicant) v. Ferguson Neudorf also operating as Neudorf Glass (Respondent) (*Endorsed Settlement*)
- 1113-95-G: Construction Workers Local 53, CLAC (Applicant) v. Air Flow Mechanical Heating & Cooling (Respondent) (Endorsed Settlement)
- 1114-95-G: Labourers' International Union of North America, Local 506 (Applicant) v. D.S.I. Canada Limited (Respondent) (Withdrawn)
- 1120-95-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. I & I Construction Services Ltd. (Respondent) (*Endorsed Settlement*)

1155-95-G: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Arosan Enterprises Limited (Respondent) (Withdrawn)

1170-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508 (Applicant) v. G.B. Mechanique Ltée. (Respondent) (Withdrawn)

1194-95-G: Construction Workers Local 53, CLAC (Applicant) v. Air Flow Mechanical Heating & Cooling (Respondent) (Withdrawn)

1198-95-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Thackeray Roofing Company Limited (Respondent) (Endorsed Settlement)

1232-95-G: Construction Workers Local 53, CLAC (Applicant) v. Air Flow Mechanical Heating & Cooling (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0418-92-U: Peter Dyer (Applicant) v. C.A.W. Local 222 General Motors Unit (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)

1092-92-JD: United Brotherhood of Carpenters and Joiners of America Local 1256 (Applicant) v. Sheet Metal Workers' International Association Local 539, The Electrical Power Systems Construction Association, ABB Combustion Services Division and Doug Chalmers Construction Ltd. (Respondents) v. Labourers' International Union of North America, Local 1089 (Intervener) (Dismissed)

1266-94-R: Bakery, Confectionery and Tobacco Workers' International, Union Local 264 (Applicant) v. Thornhill Bakery Ltd. (Respondent) (*Denied*)

2170-94-U: Alda May Campbell (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. North York General Hospital (Intervener) (Denied)

2551-94-U; 2552-94-U: Anna Recine-Pynn (Applicant) v. Labour Council Development Foundation, Office and Professional Employees International Union, Local 343 and (Respondents) (Dismissed)

3450-94-R: Earl Bernard Doucet (Applicant) v. The United Brotherhood of Carpenters and Joiners of America, Local Union 1072 (Respondent) v. SHG Marketing Co, a division of Suzanne Enterprises (Intervener) (Dismissed)

3519-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. The Quality Maintenance Group 1051013 Ontario Limited (Respondent) (*Granted*)

RIGHT OF ACCESS (SEC. 11.1) - PICKETING

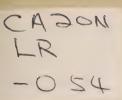
1961-94-M: Nelson Quarry Company (Applicant) v. United Steelworkers of America (Respondent) v. Communications, Energy and Paperworkers Union of Canada, Local Union No. 494 (Intervener) (*Dismissed*)





Ontario Labour Relations Board, 400 University Avenue, Toronto, Ontario M7A IV4





ONTARIO LABOUR RELATIONS BOARD REPORTS

August 1995



ONTARIO LABOUR RELATIONS BOARD

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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the Ontario Labour Relations Board

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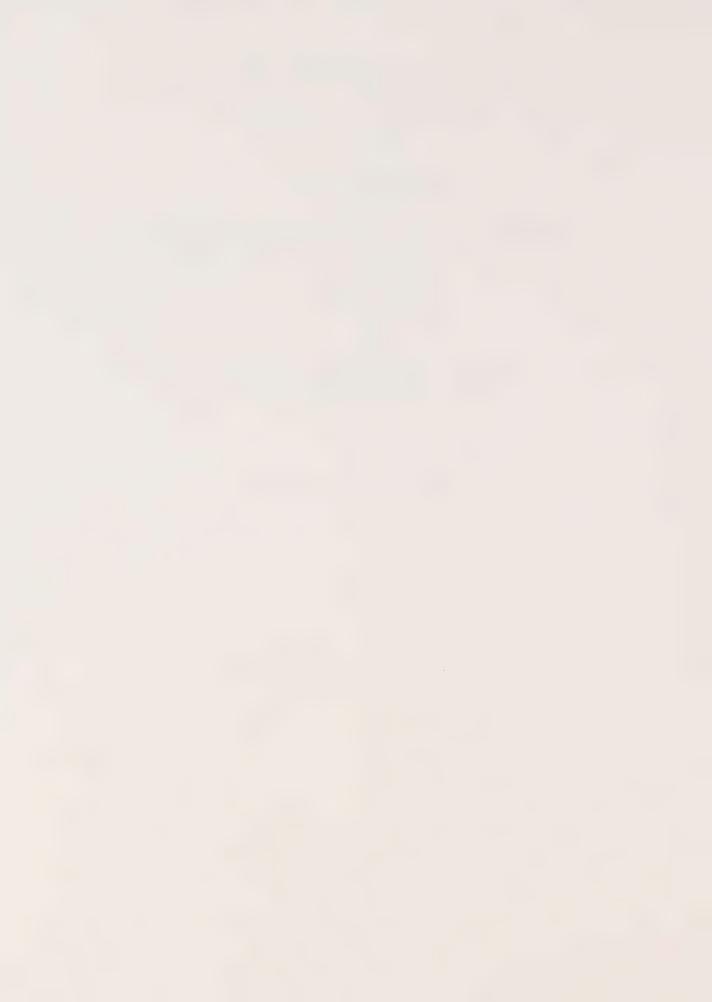
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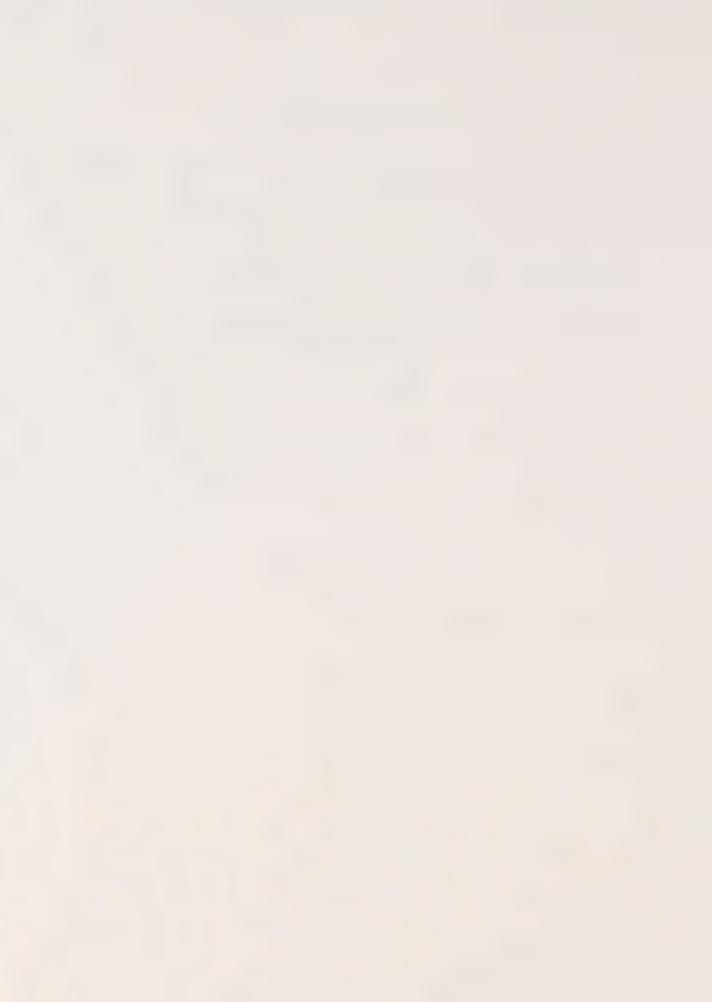
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Bargaining Unit - Combination of Bargaining Units - Employer applying to combine bargaining units of stationary engineers and maintenance workers - Board not accepting responding party's argument that bargaining units in question represented by separate locals of national union - Board dismissing objection to its jurisdiction to combine the units

BEFORE: Gail Misra, Vice-Chair, and Board Members S. C. Laing and K. S. Brennan.

DECISION OF THE BOARD; August 14, 1995

- 1. In a decision dated July 7, 1995, the Board found that it had the jurisdiction to combine the two bargaining units referred to in this application and further found that the two bargaining units were represented by the Canadian Union of Public Employees. These are our reasons for that decision.
- 2. For the purpose of this preliminary issue, the relevant section of the *Labour Relations Act* is section 7(1), which states as follows:
 - 7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.
- 3. The responding party (the "union") argued as a threshold issue that the Board did not have the jurisdiction to address this combination application because the two bargaining units in question were "not represented by the same trade union". The applicant (the "employer" or "Carleton University") took the position that the two bargaining units were represented by the same trade union, the Canadian Union of Public Employees (the "National" or "CUPE National").
- 4. It is apparent from the written submissions that there is not much difference between the parties on the salient facts relevant to this preliminary issue. It is unnecessary to recount all of the details of the submissions. However, the facts relied upon by the Board in reaching its decision are outlined below.

* * *

5. On August 6, 1964, the Canadian Union of Public Employees was certified as the bargaining agent for the following bargaining unit:

Certificate

Upon the application of the applicant and in accordance with the provisions of The Labour Relations Act THIS BOARD DOTH CERTIFY *The Canadian Union of Public Employees* as the bargaining agent of all employees of Carleton University in its department of building and grounds at Ottawa, save and except foremen, persons above the rank of foreman, office staff, security guards, persons regularly employed for not more than 24 hours per week and persons covered by the subsisting collective agreement between Carleton University and International Union of Operating Engineers, Local 869.

[emphasis added]

6. On September 1, 1964, the Canadian Union of Public Employees granted a Charter to

"Local Union 910 Carleton University/grounds & maintenance staff". This Charter authorized the new Local to enact by-laws, which it subsequently did. It would appear that since certification and being chartered, "the Canadian Union of Public Employees and its Local 910" have entered into successive collective agreements with Carleton University.

7. The latest collective agreement submitted to the Board by the parties is dated February 13, 1991. The "Recognition and Negotiations" clause, Article 2, states as follows:

ARTICLE 2

RECOGNITION AND NEGOTIATIONS

2.01 The Employer, or anyone authorized to act on its behalf, recognizes the Canadian Union of Public Employees as the sole collective bargaining agent for all of its employees in its Buildings and Grounds Services at Ottawa, save and except foremen, persons above the rank of foremen, office staff, persons regularly employed for not more than 24 hours per week, students hired during summer vacation and persons covered by the existing collective agreement between Carleton University and Independent Canadian Transit Union, Local 6, and hereby agrees to negotiate with the Union, or any authorized committee thereof, in all matters affecting the relationship between the parties to this agreement, looking towards a peaceful and amicable settlement of any differences that may arise between them.

2.02 The union shall have the right at any time to have the assistance of a National Representative of the Canadian Union of Public Employees when dealing or negotiating with the Employer. Such representative shall have access to the Employer's premises in order to attend meetings with the Employer.

[emphasis added]

As is clear from a comparison of the text of the original certificate and the recognition clause (Article 2.01), the parties have made a number of changes to the bargaining unit description. The trade union name has not, however, been amended in the intervening period of almost 30 years.

- 8. Local 910 submitted examples of grievances, grievance arbitration awards, correspondence, and minutes of meetings in the name of Local 910. Collective agreements reached with respect to this entity have, at least since 1980, been signed by representatives of the CUPE National, along with the Local.
- 9. On July 15, 1994, the Board issued a certificate for the following unit of employees at Carleton University:

Certificate

Upon the application of the applicant and in accordance with the provisions of the Labour Relations Act, THIS BOARD DOTH CERTIFY *Canadian Union of Public Employees* as the bargaining agent of all employees of Carleton University in the Regional Municipality of Ottawa-Carleton, in the Central Heating Plant employed as Stationary Engineers and persons primarily employed as their helpers, save and except the Chief Operating Officer.

[emphasis added]

- 10. On July 27, 1994, the Canadian Union of Public Employees granted a Charter to "Local Union 3778 Carleton University Stationary Engineers", pursuant to which this Local could enact its own by-laws. By-laws were later enacted and an executive elected. There is presently no collective agreement for this bargaining unit.
- 11. The CUPE National Constitution was submitted to the Board to support the union's

contention that the National recognizes each local union as a separate and distinct union having an affiliation with the National. The responding party contends that CUPE National transferred its membership to Local 3778 when the latter was chartered.

- 12. The employer filed an application for combination of these two bargaining units on May 30, 1994, after an application for certification for the stationary engineers had been filed by CUPE National on May 19, 1994 (Board File No. 0617-94-R).
- 13. It is on the basis of the facts outlined above that the responding party argued that the two Locals were represented by separate bargaining agents and that the Board therefore had no jurisdiction to consider the combination application.

* * *

- 14. The parties agree the Board's jurisprudence establishes that a parent union and its locals may each have distinct and separate status under the *Labour Relations Act* as may two locals of the same union (see, for example, *Repla Limited*, [1990] OLRB Rep. May 612, and *The Corporation of the City of Gloucester*, [1989] OLRB Rep. Aug. 846).
- 15. In the more recent section 7 jurisprudence, the Board has held that two distinct locals affiliated with the same international trade union cannot be combined if each holds its own trade union status within the meaning of section 1(1) of the Act. (See *FPC Flexible Packaging Corporation*, [1994] OLRB Rep. July 844, at paragraph 8, and *Canadian Bank Note Company Limited*, April 20, 1995, Board File No. 1687-93-R, unreported.)
- 16. The Board has long held that for a trade union to be recognized as an exclusive bargaining agent for a group of employees under the *Labour Relations Act*, it must first establish its trade union status to the satisfaction of the Board. Once status has been proven, it does not have to be proved again every time that union seeks bargaining rights under the Act.
- 17. There is no evidence, and indeed nothing before the Board, to suggest that Locals 910 and 3778 respectively have ever proven their status before the Board. They have therefore not been recognized by the Board as trade unions within the meaning of section 1(1) of the Act.
- 18. Section 63 of the Act states how a successor union may acquire the rights, privileges and duties of a predecessor union. It states as follows:
 - 63.- (1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.
 - (2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.
 - (3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.
- 19. The responding party claims that there was a transfer of membership from CUPE

National to Locals 910 and 3778 respectively when each Local was granted its Charter from the National.

- 20. However, there is no evidence before the Board that *the Board* made any findings of successorship for either of these Locals.
- 21. Since the Board has not found CUPE Local 910 and CUPE Local 3778 to have trade union status under the Act, and since there has been no declaration of a transfer of jurisdiction made by the Board from CUPE National to these two Locals, it is difficult to see how the two Locals can be found to be two distinct trade unions.
- 22. The recognition clause referred to in paragraph 7, above, refers to "the Canadian Union of Public Employees as the sole collective bargaining agent for all of [Carleton University's] employees in its Buildings and Grounds Services at Ottawa ...". It too suggests that the National Union continues to hold exclusive bargaining rights for the Local 910 members.
- 23. It was for all of the above reasons that we found that the trade union representing the employees in the two bargaining units in question was the Canadian Union of Public Employees and that the Board therefore has the jurisdiction to consider this combination application.

3698-93-R International Association of Bridge, Structural and Ornamental Iron Workers, Local 759, Applicant v. **Dingwell's Machinery & Supply Limited,** Responding Party

Certification - Construction Industry - Timeliness - Ironworkers' union applying to represent its standard unit of ironworkers and apprentices - Employer submitting that ironworkers and all other employees already represented by Machinists' union and that relevant collective agreement making certification application untimely - Board holding that Machinists' collective agreement not covering work in issue and not constituting bar to application - Certificates issuing

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members W. A. Correll and P. V. Grasso.

APPEARANCES: Gary Caroline for the applicant; Fred J. W. Bickford for the responding party.

DECISION OF THE BOARD; August 18, 1995

- 1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*. The applicant applied for its standard unit of ironworkers and ironworkers' apprentices in the ICI sector and all other sectors in Board Area No. 22, (The District of Thunder Bay).
- 2. For ease of reference we will refer to the applicant as Ironworkers Local 759 or the union and the responding party as Dingwell or the company. The International Association of Machinists and Aerospace Workers will be referred to as machinists or IAM. The jobsite at Northern Wood Preservers Inc. will be referred to as NWPI or jobsite.

- 3. The nature of the work is described as "installation of conveyors and miscellaneous steel and the erection of buildings at NWPI.
- 4. The Board (differently constituted) in its decision of February 23, 1994 made certain directions and stated as follows:
 - 2. The responding party, in its response, states that all employees of the responding party are members of the International Association of Machinists and Aerospace Workers, and are currently covered by a collective agreement with that union which expires on April 30, 1996. Accordingly, the responding party states that this application is untimely. Various other submissions regarding the application are contained in the response.
 - 3. In the construction industry the Board typically disposes of applications for certification without a hearing. In this case, as a result of the nature of the response, it is appropriate to schedule a hearing to hear the evidence and submissions of the parties. A Labour Relations Officer will be appointed to confer with the parties prior to the hearing in order to narrow (or perhaps eliminate) the issues to be dealt with by the Board at the hearing.
 - 4. The Board notes that the International Association of Machinists and Aerospace Workers has not been provided with notice of this application. The Board orders that a copy of the application for certification and a copy of the response be sent to the International Association of Machinists and Aerospace Workers, and provides that trade union with twelve days to file an intervention in this application should it so desire.
- 5. Notice of this application was given to the machinists and the matter was scheduled for hearing. The Board heard the evidence of five witnesses during ten days of hearing and received twenty exhibits. No one appeared on behalf of the machinists throughout the numerous days of hearings. No intervention was filed by the machinists.
- 6. In Appendix "A" of its Response to Application for Certification, Construction Industry, the responding party took the position that this application is untimely, that the IAM represents all the employees of the company. In the alternative, a craft severance is inappropriate because of the nature of the business, the intermingling of employees and duties.
- 7. The Board heard a great deal of evidence. It is not necessary to set out this evidence in detail as the relevant evidence to our determination is not in dispute. The applicant's witnesses described the work they performed at NWPI during the erection of structural and support steel and the installation of equipment. On the application date the work involved erecting support steel for the cumulator deck.
- 8. The evidence of Robert Bell shows the company negotiated directly with the employees as to the terms and conditions to be applied on this particular jobsite. It was Mr. Bell's evidence that if employees did not want to work under a separate arrangement then it was assumed the terms and conditions of the IAM agreement would apply. There was a meeting with the employees at the start of phase 1 of the NWPI site to discuss the scope of the work, the timing and their choice of working under the collective agreement or under a different arrangement working six or seven weeks at sixty hours per week and getting paid for ten weeks or working forty hours straight time under the collective agreement. This was referred to by Mr. Bell as a "win-win" situation. On the second phase the employees rejected a similar arrangement and worked under the IAM agreement.
- 9. Both Mr. Bell and Mr. Gilbride testified with respect to the company's history in performing this kind of installation since 1951.
- 10. The responding party takes the position that while this case took 10 days it is not that

complex. Both the issues and the evidence are fairly simple and the responding party submits leads inescapably to certain conclusions. Counsel submits it is possible to lose sight of the real issue because the Board heard a lot of extraneous evidence which is a long way from the issue of whether this application is timely.

- 11. Counsel for the responding party refers to the collective agreement of the machinists, exhibit no. 5, which is effective from May 1, 1993 and runs for three years, until April 30, 1996. Counsel refers also to the purpose clause in the collective agreement which together with the original certification in 1953 defines the scope of the bargaining unit. The responding party submits on the application date four of the five persons at work in the proposed bargaining unit were occupying classifications that are covered under article 3 of the collective agreement. All except one were paying dues to the IAM.
- 12. Counsel for the responding party states that the evidence shows this company has done similar work since 1951 including the work currently performed at NWPI and that employees on all those jobs were covered by the IAM's collective agreement at all times. This evidence is unchallenged. Counsel refers to articles 1:03, 16:03 and 16:04 of the collective agreement in support of its position that the work at NWPI is covered by the machinists' collective agreement.
- The responding party in support of its case cites the following cases: Corporation of the City of St. Thomas, [1993] OLRB Rep. May 408; The Ottawa Citizen v. Ottawa Newspapers Guild, [1969] OLRB Rep. Mar. 1268; The Parkdale Wines Limited, [1970] OLRB Rep. July 485; RE The Crown in Right of Ontario and O.P.S.E.U., (1985) 19 L.A.C. (3d) 161; Dover Corporation (Canada) Limited, [1976] OLRB Rep. Dec. 807; Atway Transport Inc., [1989] OLRB Rep. June 540.
- 14. The applicant submits the work performed by the persons in the proposed bargaining unit was construction industry work. The applicant points out there is only one party claiming a bar, the responding party. In the applicant's view the absence of the machinists "speaks volumes". The applicant states the responding party bears the onus with respect to three issues,
 - a) collective agreement bar
 - b) not construction industry work
 - c) not work of the ironworkers trade.
- 15. The applicant asserts there is no evidence led by the responding party supporting their contention that the work is not construction industry work or not ironworkers' work. Counsel further submits there is no direct evidence that the machinists union was aware of any special arrangements for site work. However even if they did know it would not create bargaining rights for the International Association of Machinists & Aerospace Workers over the five persons in question.
- 16. In support of its position the applicant relies on the following cases: *Volcano Inc.*, [1988] OLRB Rep. Jan. 97; *Rockwell International Corporation*, [1981] OLRB Rep. June 780; *Memorial Hospital, Bowmanville*, [1975] OLRB Rep. Apr. 391; *Ecodyne Limited*, [1979] OLRB Rep. July 629; *The Corporation of the City of Etobicoke*, [1983] OLRB Rep. Nov. 1825; *Duplate Canada Ltd.*, 60 CLLC 16,169 (OLRB); *The Frid Construction Company, Limited*, [1975] OLRB Rep. March 146; and *J.C. Carpentry*, [1982] OLRB Rep. Nov. 1649.
- 17. In reply, the responding party's counsel addressed the union's assertion as to what conclusions the Board should draw by the absence of the IAM. Counsel submits the IAM could have intervened and supported the applicant but it took no position whatsoever. The fact that the machinists took no position whatsoever in the context of a forty year collective bargaining relation-

ship should lead the Board to draw an inference more favourable to the company than the applicant. That is particularly so given the manner in which the applicant first raised this issue, namely filing a jurisdictional dispute application.

- 18. Counsel for the responding party urges the Board to read its notes carefully and reject some of the characterizations in the written submissions of the applicant. In some areas the responding party disputes the evidence as interpreted by the applicant including whether the employees approached the union or if it was the other way around.
- 19. Counsel for the responding party submits the Board, differently constituted, identified the threshold issue in its decision of April 18, 1994 as the timeliness issue. In dealing with the other issues counsel for the responding party made it clear he is in no way agreeing that it is necessary for the Board to make those determinations, i.e. is this construction work? The responding party submits there is no reason to depart from the Gilvesy test regarding what work was done on the application date. Counsel submits the Board cannot disregard the evidence of Mr. Bell and Mr. Gilbride regarding the range of similar work, for example welding work on a steel structure, the frame supporting the cumulator deck.

Decision

- 20. There is a threshold issue, namely is the machinists agreement a bar to this application. Or, in other words, is the work performed by the employees that are affected by this application covered by the machinists agreement? It is not clear to the Board how one can deal with the timeliness issue without first looking at the work that was performed on the application date by the employees working in the proposed bargaining unit.
- Having reviewed the evidence the Board finds the work performed by the persons affected by this application on the application date, is construction work as defined in the *Labour Relations Act*. It is work performed in the ICI sector of the construction industry. We are satisfied on the totality of the evidence before us that this is work within the jurisdiction of the Ironworkers. We then look at the evidence to determine whether the IAM collective agreement is a bar to this application. The responding party referred us to articles 1.03, 16.03 and 16.04 of that agreement in support of its contention that the collective agreement does apply to the work performed on site.
- 22. Articles 1.03, 16.03 and 16.04 read as follows:
 - 1.03 The Union recognizes the sole right of the Company to manage its affairs and direct the work of its employees. This will be deemed to include the right to hire, promote, demote, suspend, discharge for cause, and transfer employees from one job to another job, and increase or decrease the working force of the Company from time to time. Nothing in this agreement shall be construed or interpreted as limiting the Company in any way in the exercise of the regular and customary functions of the Management including the extension, limitation, curtailment or cessation of its operations.
 - 16.03 The Company will provide proper protection from the elements when transporting men to and from outside work.
 - 16.04 Employees are not required to use personal vehicles for Company work.
- 23. Articles 16.03 and 16.04 refer to safety. article 1.03 is the managements rights clause and does not speak to bargaining rights with respect to on site work.
- 24. The collective agreement describes the skills of a journeyman machinist in article 2.

2.01 Journeyman Machinist

A Journeyman Machinist is one with a valid Ontario Machinist's Certificate or five (5) years' experience in the machining trade, ninety (90) calendar days experience in the Company, and one who can be effectively proficient.

The basic factors on which a Machinist must be proficient are as follows:

- 1. Lathe work.
- 2. Milling.
- 3. Vertical Boring.
- 4. Horizontal Boring.
- 5. Shaping.
- 6. Planing.
- Radial Drill Press work.
- 8. Bench, floor and field work.
- 9. Layout work.

The following elements are essential to the successful completion of job assignments and are to be considered when appraising the employees' performance on the basic factors of the trade.

- 1. Set up job.
- 2. Select, sharpen and obtain proper contours on cutting tools.
- 3. Adjust cutting tools and operate machine tools at an efficient rate.
- 4. Use measuring tools and devices effectively.
- 5. obtain specified finish and tolerance.
- 6. Consistently produces and acceptable amount of work of standard quality.
- 25. Article 2.02 describes what is expected of journeyman welder.
- 26. The classifications and wage rates are set out in article 3.04 effective May 1, 1994 the hourly wages are:

ARTICLE 3 - MINIMUM RATES OF PAY

- 3.01 The application of the terms of this agreement shall not have the effect or reducing any employee's wage rate in force at the time of its execution.
- 3.02 Machinists' lead hands are to be paid thirty-five (35) cents per hour above their regular classification.
- 3.03 Welder lead hands are to be paid twenty-five (25) cents per hour above their regular classification.

3.04	Classification	and Wages:

	May 1/93	May 1/94	May 1/95
Journeyman Machinist — Standard	19.96	20.16	20.56
Journeyman Machinist — Intermediate	18.97	19.16	19.54
Journeyman Machinist — Starting	17.96	18.14	18.50
Journeyman Welder — Standard	19.96	20.16	20.56
Journeyman Welder Intermediate	18.97	19.16	19.54
Journeyman Welder — Starting	17.96	18.14	18.50
Labourer — Standard	10.04	10.14	10.34
Labourer — Starting	8.13	8.21	8.38

- 27. The collective agreement does not refer to any classification or definition with respect to the installation of conveyors, structural steel or the erection of buildings.
- 28. It is clear from the responding party's own evidence that it is rather casual in its approach to applying the IAM collective agreement on the NWPI jobsite. Negotiations are conducted directly with the employees for special arrangements and another person is working without paying dues to the IAM. There is some disagreement in the evidence with respect to whether the employees had a choice of accepting the special arrangement or working under the IAM collective agreement or some other arrangement. For the purpose of deciding whether the IAM agreement is a bar to this application much of the evidence is not relevant including whether there was a choice, whether dues were paid or other arrangements were made or whether there was a union steward on site. What is relevant is that the collective agreement itself does not make any reference to the work performed. The terms and conditions of the collective agreement, on the company's own evidence, were either applied in a casual or flexible manner or not at all. Terms and conditions were unilaterally negotiated with employees. There is no direct evidence before us of the IAM's knowledge of these arrangements.
- 29. Of significance is the absence of the IAM. Both parties ask the Board to draw inferences in their favour by this absence. The decision of the Board (differently constituted) clearly sets out the threshold issue affecting bargaining rights of the IAM (see paragraph 4 above) and directing that notice of the hearing be sent to the IAM. As indicated before no one appeared on behalf of the IAM to assert that the work performed at NWPI is covered by the IAM collective agreement.
- 30. Based on all of the evidence, both *viva voce* and documentary, we find that the IAM collective agreement does not cover this work and therefore the IAM agreement is not a bar to this application.
- 31. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 141(1) of the Act on April 12, 1978, the designated employee bargaining agency is the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario.
- 32. The Board further finds that this is an application for certification within the meaning of section 121 of the *Labour Relations Act* and is an application made pursuant to section 146(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119 shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

- 33. The Board further finds, pursuant to section 146(1) of the Act, that all ironworkers and ironworkers' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers' apprentices in the employ of the responding party in all other sectors in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.
- 34. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on January 24, 1994, the certification application date, had applied to become members of the applicant on or before that date.
- 35. Section 146(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

Therefore, pursuant to section 146(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 31 above in respect of all ironworkers and ironworkers' apprentices in the employ of Dingwell's Machinery & Supply Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

36. Further, pursuant to section 146(2) of the Act, a certificate will issue to the applicant trade union in respect of all ironworkers and ironworkers' apprentices in the employ of the Dingwell's Machinery & Supply Limited in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except nonworking foremen and persons above the rank of non-working foreman.

0999-95-R United Food and Commercial Workers International Union, Applicant v. Oshawa Group Limited, c.o.b. as **Dutch Boy Food Markets** (Weber Street), Responding Party

Certification - Practice and Procedure - Board scheduling inquiry into non-sign allegation in connection with union's certification application - Union seeking leave to withdraw certification application on eve of hearing, and later that day filing new certification application - Employer opposing withdrawal of first application - Employer seeking to have matter proceed and (given its understanding of union's level of membership support) to have Board direct representation vote - Board dismissing union's first certification application

BEFORE: M. A. Nairn, Vice-Chair, and Board Members S. C. Laing and K. S. Brennan.

APPEARANCES: Micheil Russell and Michael Church for the applicant; Fred Hamilton for the responding party.

DECISION OF M. A. NAIRN, VICE-CHAIR AND BOARD MEMBER K. S. BRENNAN; August 23, 1995

- 1. This is an application for certification. Pursuant to a decision of the Board dated July 19, 1995, a hearing was scheduled for Monday, August 14, 1995 to inquire into apparent irregularities with respect to membership evidence filed on behalf of an employee in the application. On Friday, August 11, 1995, the applicant (the "trade union") advised the Board that it was seeking leave to withdraw its application. The responding party (the "employer") opposed that request. Following an adjournment of the proceedings on August 14, the matter convened on August 15, 1995 to deal with the issue of whether or not the Board ought to grant leave to the trade union to withdraw its application.
- 2. The facts giving rise to this issue are, in most respects, a matter of record and there was no dispute concerning them. The union merely noted that it did not necessarily agree with the employer's characterization of some of the facts.
- 3. This application was filed on May 6, 1995. Following the usual notice to the employer and employees, the parties met with a Labour Relations Officer. Two documents from employees had been filed. At the Officer's meeting, the parties were informed that the dates on the membership evidence filed by the trade union post-dated the date of a first petition. The parties were further informed that the second document had been filed with the Board after the application date. In the circumstances, the parties understood that, in light of the timing of the collection of signatures and the operation of section 8(4) of the *Labour Relations Act* (the "Act"), neither document was relevant to the application. No objecting employee attended the Officer's meeting.
- At that meeting, the parties reviewed, in the normal course, the description of the bargaining unit. Subject to certain challenges to the list of employees the parties were informed of the "count". The parties were further informed that the challenges would not negatively affect the applicant's right to certification based on the membership evidence filed. The parties had the opportunity to review the A-4 Form filed. At the meeting the employer raised certain issues in an attached letter. Subsequently however, the employer consented to a decision issuing and waived its right to a formal hearing. The Board acted on that letter and cancelled the hearing that had been scheduled. Subsequently, the parties received the decision of the Board dated July 19, 1995. That

decision reviews the application and the parties' agreements. It indicates that the union is in an interim certifiable position pursuant to section 6(2) of the Act.

- 5. However, the decision also identifies that, during the course of the Board's usual second check of the membership evidence filed in support of the application, the Board identified a signature on a card submitted which did not appear to match the corresponding specimen signature filed by the employer. As the decision sets out, the Board dispatched a Labour Relations Officer to interview the employee concerned. During the course of that interview the employee denied signing the application for membership in the applicant union and indicated that he believed another employee had signed the card without his consent.
- 6. In light of that report of the Officer, the decision of July 19, 1995 sets the matter down for hearing, as set out earlier, to inquire into this irregularity.
- 7. On Friday, August 11, 1995, counsel for the trade union advised counsel for the employer that the union was seeking to withdraw its application. On being asked why the request was being made so close in time to the hearing date and not earlier, counsel for the union advised that the union had sought to obtain additional membership evidence which it had been successful in doing by August 10. Therefore the request to withdraw was made August 11. Counsel for the trade union further advised counsel for the employer that the union intended to file a new application as a result.
- 8. That new application was filed on Friday, August 11 late in the day. That application seeks to transfer some of the membership evidence from the first application. Additional membership evidence has also been filed. The second application is virtually identical to the application before us.
- 9. The employer would also rely on two earlier decisions of the Board between these parties dated January 3, 1995 and April 5, 1995 [now reported at [1995] OLRB Rep. Apr. 477] (dealing with applications for certification for other locations) wherein, the employer submits, the conduct of the trade union is such that the Board ought to take it into account in dealing with this request to withdraw.
- 10. In seeking to oppose the withdrawal of this application, it is the employer's position that the matter ought to proceed on its merits. The employer does not seek to have the application dismissed. It seeks to have the matter proceed and, given its understanding of the membership evidence filed, to have the Board direct a representation vote. The employer submits that absent the membership card under question, the union would no longer enjoy the support of more than fifty-five percent of the employees in the bargaining unit but would be in a vote position. It is the position of the union that the Board ought to grant leave to withdraw the application, or in the alternative, to dismiss the application without a bar.
- The union submitted that the Board has no jurisdiction to proceed with the application on its merits. As noted in the Board's decision in *C.F.M. Inc.*, (decision dated June 9, 1995, as yet unreported) [now reported at [1995] OLRB Rep. June 725], it is not clear whether the Board retains any residual discretion to consider a matter once the party that has brought an application no longer wishes to pursue it. The Board refers to the case in *Boal Quay Wharfingers Ltd.* v. *King's Lynn Conservancy Board*, [1971] 3 All E.R. 597 at pages 602-5. The employer in the instant case argues that the Board does have jurisdiction, else why would an applicant require leave to withdraw. An applicant seeks leave to withdraw an application in order to avoid the dismissal of that application which result may have different consequences for the applicant. Unlike a court, the Board has no inherent jurisdiction. Its jurisdiction must be founded in its enabling statute.

Once the basis for the exercise of that jurisdiction is no longer being pursued, it is not at all clear that the Board has jurisdiction to continue. However, we will assume for purposes of this decision that the Board does have jurisdiction to determine whether or not to refuse leave to withdraw and proceed with the merits of the application.

- 12. The employer's opposition to the union's request can be summarized in three broad categories; maintenance of the Board's integrity and reputation, avoiding an abuse of process, and thirdly, an argument with respect to the operation of section 8(4) of the Act. On a careful review of those submissions, it is apparent that much of the employer's concern and argument arises and is focused on the fact that the union filed its second application on the same day that it sought leave to withdraw this one. It argues that a request to withdraw is not usually contested because there is an expectation of a trade union abandoning its application. However, in this case the union continues to seek to acquire the right to become the bargaining agent. The timing of the filing of the second application underlies the employer's argument with respect to the operation of section 8(4) of the Act. The employer argues that by virtue of choosing this date to both withdraw and reapply, the trade union is manipulating the process so as to preclude employees from opposing the second application, thereby denying employees a right under the Act. The employer argues that the issue of the alleged non-sign in this application is not moot in that the trade union is still seeking the right to represent employees.
- 13. The employer argues that it would undermine the Board's processes and be an attack on the Board's integrity to allow the trade union to avoid an inquiry into the alleged non-sign. The employer argues that it is a Board-initiated hearing and in order to protect the integrity of the Board and its reputation in the eyes of the employer community, the Board must review the membership evidence to ensure against any reprehensible conduct on the part of the trade union. The employer argues that absent that inquiry there is no loss or lesson to be learned by this trade union or other unions coming before the Board. The employer argues that the perpetrator of the forgery can mislead the Board and avoid public inquiry.
- 14. These submissions assume first of all that a forgery has been established. That is not the case. At this stage of the proceedings, there is an allegation arising as a result of the Board's review of the membership evidence. In our view, the Board's reputation with respect to the standard that it requires of the membership evidence filed in support of an application does not come under question. It was the Board, in "policing" its procedures on its usual review of the evidence, that both detected and raised the concern.
- 15. There is an obvious and serious loss to a trade union that relies on membership evidence that is deficient or otherwise fails to meet the standard required by the Board. It will not be considered reliable by the Board and cannot be used as evidence of support. In this case, the union has chosen not to rely on this membership evidence. Inherent in that decision is the potential for both a loss of support among the employees and a delay in pursuing the right to represent the employees.
- 16. The employer argued that if an interim certificate had issued and the allegation of a non-sign was later discovered, that matter could be brought back to the Board under section 59 of the Act. In our view, this highlights the risk of loss to a trade union in seeking to withdraw an application. If a certificate had issued and the Board subsequently found that a fraud had been committed in respect of the membership evidence relied on, the right to represent those employees would be terminated. Similarly, in this case, the applicant will be unable to obtain the right to represent employees through this application. If the trade union were to seek to rely on the same membership evidence in a subsequent application, the Board would inquire into that membership

evidence. Should the trade union seek to rely on different membership evidence, the trade union is obligated to seek and obtain that membership evidence and to convince employees that they ought to support the trade union.

- 17. In the same vein, the employer argues that it is necessary to hear the evidence with respect to the allegation and publicly identify what was involved in attempting to mislead the Board. The employer argues that a party is not entitled to withdraw in order to avoid the discovery of improprieties. The employer argues that a party cannot stop an action because it does not like the way the case is proceeding, and then refile the same application.
- 18. This analogy in our view is a misapprehension of the certification process. While the Board might well exercise its discretion not to inquire into an unfair labour practice complaint if the matter was, in essence, *res judicata*, a certification application is of a different character. An application for certification is more akin to a licensing process in which an applicant is required to meet certain obligations, the most critical being obtaining the support of employees in the bargaining unit. (See *R.J.R. MacDonald Inc.*, [1992] OLRB Rep. April 503).
- 19. The employer argues that it would be an abuse of process to allow the trade union to withdraw and reapply. The parties had completed the process at the Board. Allowing the trade union to withdraw and to pursue its second application would involve time and expense to both the employer and the Board. There would be confusion in the minds of employees who had been told they had certain rights under the first application and would now be subject to a second application. In our view, these arguments are more appropriately directed at the question of whether or not the Board ought to allow the trade union to proceed with its second application rather than an issue of whether it disentitles the union from withdrawing the current application. To the extent that the union's conduct in earlier applications involving other locations of the employer is relevant, if at all, those arguments too are more appropriately directed to consideration of the second application.
- 20. The employer argues that to allow the union to withdraw this application and file a second application on the same day allows the union to artificially and arbitrarily foreclose any opportunity for anyone other than the trade union to express views concerning support. The employer notes that while the Board was seized with this application, the union sought and obtained fresh membership evidence which it has filed in its second application. The trade union, the employer argues, would be forbidden from filing such fresh membership evidence in support of this application. Section 8(4) of the Act provides that the cut-off date for the receipt of evidence of support or opposition is the date of application. The employer notes that reasonable employees would be of the view that they were no longer entitled to file opposition to the trade union pursuant to the Board's notice filed in the workplace. Therefore the timing of the second application prejudices the rights of employees in that respect.
- The employer acknowledges that in the normal course an applicant has the opportunity to choose its application date and having done so, by operation of section 8(4) of the Act, employees would be foreclosed from any opportunity of filing evidence of opposition to the trade union. In this case however the employer is relying on the timing of the second application. It is somewhat ironic to note that had the union in this case not informed counsel for the employer that it intended to file a second application immediately, the matter may have gone unopposed on the employer's argument that there was an expectation of an abandonment of the right to represent employees. Had the union been less forthcoming with the employer, much of the employer's argument would have been foreclosed.
- 22. In any event, in our view, any limitation on an employee's opportunity to voice opposi-

tion to the trade union arises as a result of the operation of section 8(4) of the statute. Under the Act, an applicant does have the opportunity to choose its application date, and by doing so, limit the opportunity of others to oppose that application. In our view, the fact that the employees were aware that this application was pending and that the time for filing opposition for it had passed, does not disentitle them from opposing any potential second application. While we agree that an employee is entitled to rely on the Board's notice with respect to the first application, we see no basis for concluding, given the statutory framework, that the employee suffers any greater loss of opportunity in the second application because the first application is sought to be withdrawn at the same time.

- There are many examples in the caselaw where a trade union has withdrawn an application or has had an application dismissed without a bar and a subsequent application has been filed within a relatively short period of time (for example, see cases cited in *Transcor Inc.*, [1993] OLRB Rep. Nov. 1233). The more unusual circumstance is the fact that this trade union has sought to withdraw and reapply on the same day. However, this too is not without precedent. In *General Signal Limited*, [1993] OLRB Rep. June 509 the trade union sought leave to withdraw and on the same day filed a second application. The following day the Board refused leave to withdraw the first application and determined instead that it should be dismissed.
- 24. The Board has also allowed an applicant not to pursue an application (whether withdrawn or dismissed without a bar) in the face of allegations *or* findings arising out of non-sign or non-pay concerns (see *Hydro Electric Commission of Hamilton*, (1958) CLLC 1738 and *Flo-Con Canada Inc.*, [1989] OLRB Rep. July 752). In those cases subsequent applications for certification were filed and were dealt with by the Board on their own merits, and in light of the earlier applications.
- 25. We do not find the cases relied on by the employer to be of specific assistance in that the facts and, in some, the prevailing statute, are different. In fact, the decisions in *Circlet Food Inc.*, [1993] OLRB Rep. May 406 and *Leco Industries Limited*, [1979] OLRB Rep. May 404 would support the position of the applicant in this case. The Board's conclusion in *C.F.M. Inc.*, *supra*, that any interests are protected by permitting the responding party the opportunity to raise issues in the second application is highlighted in the circumstances of this case where much of the employer's argument against allowing the withdrawal herein arises only because of the contemporaneous filing of the second application. We note that the trade union has acknowledged that the employer is free to raise any issue in respect of the second application should it choose to do so.
- 26. To the extent that there were arguments between the parties about whether or not an issue was moot, the trade union, by no longer seeking to rely on certain membership evidence in its first application, renders moot for this application the question of whether or not the membership evidence can be relied on by the Board to indicate the level of support enjoyed by the union. The employer's position that the matter proceed to a vote is, at best, premature and speculative. It assumes the result of an inquiry when there are a number of possibilities which might flow, including certification, a vote, or dismissal of the application with or without a bar.
- 27. It has been the Board's practice to dismiss an application if the request for leave to withdraw comes after the parties have met with a Board Officer. This is consistent with paragraph 5 of Practice Note No. 7. In this regard, we adopt the reasoning in the Board's decision of *Sheraton Parkway Hotel*, [1991] OLRB Rep. Feb. 271, paras. 33-35.
- 28. This application is therefore dismissed.

DECISION OF BOARD MEMBER S. C. LAING; August 23, 1995

- 1. It is fair to say that in most cases when an applicant seeks leave to withdraw an application, there is an assumption that the claim sought is being abandoned, and therefore the Board has commented on the lack of utility in continued litigation. (*Sheraton Parkway Hotel*, [1991] OLRB Rep. Feb. 271 and *C.F.M. Inc.*, decision dated June 9, 1995, as yet unreported) [now reported at [1995] OLRB Rep. June 725].
- 2. The circumstances of this case however, do not fall within that ambit. There exists before the Board, at the time of these proceedings, an additional application which is essentially the same as the present one.
- 3. Clearly, at this juncture, the applicant union is not abandoning its claim to represent the employees of the proposed bargaining unit. Rather, in light of improprieties uncovered during the Board's usual practices, the applicant union now seeks leave to adjust its membership evidence to alleviate such inadequacies.
- 4. This being the circumstance surrounding the union's request, the Board need not be concerned that it may expend resources on issues which are essentially moot or have no immediate relevance. The issues in the present application are still very much alive and will no doubt require further allocation of Board resources.
- 5. For these reasons, in these circumstances, it is appropriate to deny the applicant union's request for leave to withdraw its application.

0816-95-R United Food & Commercial Workers International Union, Local 175, Applicant v. Fort William Golf & Country Club Limited, Responding Party

Bargaining Unit - Certification - Union applying to represent bargaining unit of "ground staff" employed by golf and country club - Employer contending that bargaining unit should include ground staff and clubhouse staff - Board finding union's proposed unit appropriate - Certificate issuing

BEFORE: Christopher Albertyn, Vice-Chair, and Board Members R. W. Pirrie and P. R. Seville.

APPEARANCES: W. Dubinsky, David Connor, Brad Hill and Rob Meckley for the applicant; Peter Hollinger and Rick Oldale for the responding party.

DECISION OF THE BOARD; August 14, 1995

The Issue

- 1. The style of cause is hereby amended to reflect the correct name of the responding party: "Fort William Golf & Country Club Limited".
- 2. This is an application for certification. The parties have agreed upon all of the matters required in a certification application, save for the determination of the bargaining unit.

3. There are three categories of employees at the Fort William Golf & Country Club: the ground staff, the clubhouse staff and the professional's staff. The parties agree that the pro-shop staff are employed by the professional, and not by the responding party. They are irrelevant to this application. The other two categories of employee are relevant to this application. The applicant is applying to represent the ground staff only, but not the clubhouse staff. The applicant contends that the ground staff employees constitute an appropriate bargaining unit. The responding party disputes that. It contends that the ground staff and the clubhouse staff together constitute the appropriate bargaining unit. The resolution of this difference will determine the applicant of find the ground staff on their own to be an appropriate bargaining unit will result in the applicant's certification in respect of those employees; to find that the ground staff alone is not an appropriate bargaining unit, and that the appropriate unit is their combination with the clubhouse employees, will result in the dismissal of this application because the applicant is not sufficiently representative of that larger unit to obtain certification.

Facts

- 4. One witness testified, Mr. Oldale, the Secretary/Manager of the Club. He explained that the administration of the Club is divided between the clubhouse operation (the bar and the restaurant) and the golf course operation. He is in charge of the clubhouse operation. The golf course operation falls under the authority of the Greenskeeper, Mr. Deneer. Mr. Oldale and Mr. Deneer each have their own budgets, determined periodically by the Club's Board of Directors. In effect, there are two distinct lines of managerial authority within the Club one in respect of the ground staff, the other in respect of the hospitality or clubhouse staff.
- 5. The ground staff fall under Mr. Deneer's authority, the clubhouse staff under Mr. Oldale. The ground staff operate from the maintenance buildings, a block situated about 700 yards from the clubhouse, where the clubhouse staff work. The maintenance block houses the maintenance shop and all of the ground staff facilities, including their lunch room, lockers and showers.
- 6. The Club's staff is mainly seasonal. Only the Secretary/Manager, the Greenskeeper, the Bookkeeper and the Mechanic are employed year round. All other staff work during the spring, the summer and the fall. Occasionally they have their contracts extended to perform particular jobs, e.g. a ground staff member was requested to build picnic furniture, which extended his contract by a month or so; the kitchen, catering and cleaning staff of the clubhouse are sometimes offered work over the festive season if the Club is used for Christmas or New Year celebrations.
- 7. Other than the mechanic, of whom more below, the grounds staff have little to do with the clubhouse. They are not permitted to enter there while in their work clothes, although, as club members, when they are not working, they use the clubhouse facilities. The ground staff have occasional contact with the clubhouse during the course of their work. Once in a while they help to lift heavy things, like picnic tables and large liquor deliveries, and they maintain and clean the outside patio area and, at times, the parking lot.
- 8. The work of the ground staff includes filling the water coolers, changing the pin and tee placements as directed by the golf professional, maintaining the greens, supervising the sprinkling and watering of the greens and the fairways, cutting the roughs and mowing the fairways. The ground staff use some expensive equipment, like the greens mowers, tractors, the utility vehicle (which contains a dump truck), the dump trucks, the golf carts and the front-end loader. The daily tasks of the ground staff are allocated to them by the Greenskeeper.
- 9. The Mechanic is a member of the maintenance (ground) staff, under the authority of the Greenskeeper. He happens to be the brother of the Secretary/Manager. He will be part of the

bargaining unit contended for by either party. His work is principally concerned with the maintenance and repair of the machinery and equipment used by the ground staff. Once in a while he is needed to perform repair work in the clubhouse or in the pro shop. Such repairs are part of his responsibility, but they occupy a relatively small portion of his actual work time.

- 10. The ground staff are readily distinguishable from the clubhouse staff because they wear a different uniform. The ground staff are required to wear green polo shirts, protected shoes and hard hats. The clubhouse staff (waitresses, bartenders, cleaners and cooks) wear red polo shirts.
- The wages and working hours of the ground staff are set by the Greenskeeper, from his budget. He determines how he will spend his budget, including how many ground staff employees he will employ, what they will be paid, what hours they will work, what leave they will receive, etc. The Secretary/Manager exercises the same discretion in respect of the clubhouse (the cleaning, catering and kitchen) staff. The wages of the ground staff are within a different range from that of the clubhouse staff.
- 12. The work times of the ground staff and of the clubhouse staff are different. The ground staff work from 5.30 a.m. until 2 p.m., preparing the course for the busy period of playing, which is usually the afternoon. They are able to get a lot done in the quiet period, before the course is used, between 5.30 a.m. and about 9 a.m. Some of the clubhouse staff, like the chef and one cleaner, start work earlier, but the bulk of them work between 2:00 p.m. and 3:00 a.m. The consequence is that the ground staff has virtually finished work for the day by the time that the clubhouse staff commence their daily duties.
- 13. In the past decade or so there has been no transfer of employees between the grounds and the clubhouse staff.
- 14. The similarities between the ground staff and the clubhouse staff are the following: they have the same golfing privileges they can use the course in non-peak times, they can use the clubhouse showers and locker facilities if they are playing golf, and they cannot play in the club tournaments. The financial administration of the clubhouse and of the grounds, and their clerical work, are performed by the Club's bookkeeper, who is responsible to the Secretary/Manager. All of the Club's staff attend the same Christmas party.
- 15. The grounds staff obtain their lunches from the clubhouse and they are charged half price for what they purchase. One of the ground staff collects the food and takes it to the maintenance block, where the ground staff gather and eat lunch together in the lunch room. The clubhouse staff are not charged for the food they consume, mainly because of the administrative difficulty of keeping an accurate record thereof.
- 16. Although co-operation is necessary between the ground staff and the Club's professional, just as it is, to a lesser extent, between the ground staff and the clubhouse staff, to all intents and purposes the grounds staff work separately from the staff of the pro shop and the clubhouse.

Decision

17. The Club is concerned that certification of the Union in respect of the limited bargaining unit sought by the Union, viz. the ground staff only, will remove management's capacity to easily assign work to the ground staff, including work in or around the clubhouse, in the manner it has been able to until now. Management is wary of rigid job classifications which may impede management's capacity readily to assign employees in an optimal manner.

- 18. Prior to dealing with the merits of the application, we consider it necessary to correct a misapprehension of the Club's management. It believes that its right to assign the work it currently assigns to the ground staff will be trammeled by the Union's certification. That is not so. The status quo is that the Club's management is able to assign members of the ground staff to perform any outdoors work, any heavy indoors or repair work and other work which is more appropriately done by the ground staff than by the hospitality staff. Unless management waives any of its current rights in a collective agreement to be concluded with the Union, management will retain the mobility rights it currently possesses to assign work. Furthermore, it is common in collective agreements for an article to provide for management's right to assign work in the manner it requires, and for there to be job assignment flexibility to ensure adequate mobility. There is nothing precluding the Club from proposing that such an article be included in any agreement it concludes with the Union.
- The responding party submitted that the larger bargaining unit it proposed, of the hospitality and ground staff together, was a better bargaining unit than that sought by the applicant. In all likelihood that is probably so, particularly as the Board's most standard unit is an all-employee unit (Sifton Properties Limited, [1993] OLRB Rep. Oct. 1010 at 1016 paragraph 33). But that is not the test stipulated in section 6(1) the Act. We are not asked to decide what is the most appropriate bargaining unit. There is also no presumption in favour of the most comprehensive unit (K Mart Limited, [1981] OLRB Rep. Sept. 1250, at 1256 paragraph 14). The Board's function is to determine whether the bargaining unit proposed by the applicant is one that is an appropriate unit for the purpose of collective bargaining. In other words, our function is not to determine what is the optimal or the most suitable bargaining unit, but rather whether the unit proposed by the applicant is viable in the sense that the employees in the proposed unit have a distinctive community of interest and there are unlikely to be serious labour relations problems as a result of the certification of the applicant union in respect of that unit. See in this regard the following passage from Homewood Health Centre, [1992] OLRB Rep. February 181, at 184 paragraph 4:

... Indeed, broader groupings are generally more desirable than narrower ones, because they avoid the labour relations problems associated with fragmented bargaining structures ... But these general considerations should not be elevated to the level of legal rules or become the focus of litigation. If a union applies for certification for a unit which is appropriate, it is entitled to that unit even though there is a plausible alternative description which would also be appropriate.

- 20. We are satisfied that there is a community of interest between the members of the ground staff. They perform the same kind of work, their conditions of employment are commensurate, they work together during the same hours each day, their skills are relatively similar, they work from the same geographic location, they perceive themselves and they are perceived as a distinct group of employees, they are substantially inter-dependent upon each other and they fall under the same managerial authority. Moreover they have signified their wish to exercise their right to bargain collectively as a distinct grouping (Canada Trustco Mortgage Company, [1977] OLRB Rep. June 330).
- 21. There is no such community of interest between the ground staff and the clubhouse staff. In virtually all significant aspects of their work they are distinct. They work from different locations, their shifts cover different times of the day, they seldom meet or interact, there is very little inter-dependence between them and no interchange, their conditions of employment are set by different managerial structures of authority, their apparel is distinct and their work conditions are different. Perhaps most significantly, the remuneration of the ground staff falls within a distinct budget, which is separate from the budget which applies to the clubhouse operation. In short, there is virtually no community of interest between the ground staff and the clubhouse staff.

- 22. There was no persuasive evidence of probable labour relations problems arising from certification of the bargaining unit sought by the applicant. (See, in this regard, the Board's comments in *Active Mold Plastic Products Ltd.*, [1994] OLRB Rep. June 617, at 625, paragraph 30). Rather, the evidence, although tangential, inclined towards the lack of any likelihood of labour relations difficulties being caused by the recognition of the ground staff as a distinct bargaining unit.
- 23. Having regard to the labour relations implications of the ground staff constituting a separate bargaining unit, the Board is satisfied that there ought not to be significant adverse labour relations effects. The difference between the ground staff and the hospitality staff is not merely a classification difference the difference goes to the root of the organization of work and administration within the Club. The ground staff are a distinctive production unit within the Club, and their constitution as a bargaining unit will merely mirror that production unit. There will be no fragmentation of labour relations within the Club by recognizing the grounds staff as a distinct bargaining unit because they already constitute a separate and distinct working unit.
- There is no reasonable fear of labour-management problems, or of tension between the ground and the hospitality staff, or of an escalation of industrial conflict, by the Board's recognition of the ground staff as a distinct bargaining unit. The division between them and the hospitality staff is such that that recognition merely gives effect to what is a *de facto* division already.
- 25. The test applied by the Board is that stated in *The Hospital for Sick Children v Group of Employees*, [1985] OLRB Rep. February 266, at 277, in paragraph 23:

[D]oes the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

- 26. On the basis of that test, the Board is satisfied that the bargaining unit proposed by the applicant is coherent and viable and that its recognition by the Board is unlikely to cause significant labour relations problems.
- 27. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
- 28. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on May 19, 1995, the certification application date, had applied to become members of the applicant on or before that date.
- 29. A certificate will issue in respect of the following bargaining unit:

all ground staff employees, including the mechanic, employed at the Fort William Golf & Country Club in the City of Thunder Bay, save and except the grounds superintendent (also known as the greenskeeper) and persons above the rank of the grounds superintendent.

Clarity note: the ground staff excludes any of the clubhouse or hospitality staff (waiters, bartenders, cooks, cleaners and the pro shop employees.)

3154-94-R; 3409-94-R; 3842-94-R; 4243-94-U Hospitality, Commercial and Service Employees Union, Local 73, Chartered by Hotel Employees and Restaurant Employees International Union, Applicant v. Hillside Townhouses Limited c.o.b. as The Victoria Inn, Thunder Bay, Responding Party v. Hospitality, Commercial and Service Employees Union, Local 73 chartered by Hotel Employees and Restaurant Employees International Union and Hotel Employees and Restaurant Employees International Union, Intervenor; Hillside Townhouses Limited C.O.B. as The Victoria Inn, Thunder Bay, Applicant v. The Hospitality, Commercial and Service Employees Union of Canada, Responding Party v. Hospitality, Commercial and Service Employees Union, Local 73 chartered by Hotel Employees and Restaurant Employees International Union and Hotel Employees and Restaurant Employees International Union, Intervenor; Hospitality, Commercial and Service Employees Union of Canada, Applicant v. Hillside Townhouses Limited c.o.b. as The Victoria Inn, Thunder Bay, Responding Party v. Hospitality, Commercial and Service Employees Union, Local 73, chartered by Hotel Employees and Restaurant Employees International Union, Hotel Employees and Restaurant Employees International Union, Intervenor; Hospitality, Commercial and Service Employees Union, Local 73 chartered by Hotel Employees and Restaurant Employees International Union and Hotel Employees and Restaurant Employees International Union, Applicant v. Hospitality, Commercial and Service Employees Union of Canada and Don Campbell, Responding Party

Union Successor Status - Board finding that purported withdrawal of local union from international union ineffective at law - Union successorship application dismissed

BEFORE: Lee Shouldice, Vice-Chair, and Board Members O. R. McGuire and B. L. Armstrong.

APPEARANCES: W. Dubinsky and Don Campbell for Hospitality, Commercial and Service Employees Union of Canada; J. James Nyman, Ed Goralski and Denis Ellickson for Hospitality, Commercial and Service Employees Union, Local 73, Chartered by Hotel Employees and Restaurant Employees International Union, and Hotel Employees and Restaurant Employees International Union; no one appearing for Hillside Townhouses Limited c.o.b. as The Victoria Inn, Thunder Bay.

DECISION OF THE BOARD; August 15, 1995

I. Introduction

- 1. These matters are, respectively, an application for certification, an application to combine bargaining units, an application for a declaration of successor status, and an unfair labour practice complaint. Each of these Board files has its genesis in an attempt by a local trade union to withdraw from its affiliation with an international trade union.
- 2. These matters all came on for hearing before this panel of the Board on May 17, 1995. At that time, the parties agreed to stipulate certain facts in order to argue a preliminary motion brought by Mr. Nyman on behalf of his clients. In essence, counsel asserted that there was not, at any time, a proper withdrawal by Hospitality, Commercial and Service Employees Union, Local

- 73, chartered by Hotel Employees and Restaurant Employees International Union (referred to in these reasons for decision as "Local 73") from Hotel Employees and Restaurant Employees International Union (referred to in these reasons for decision as "the International"). If, in fact, no proper withdrawal of Local 73 from the International had occurred, the certification application, combination application and unfair labour practice proceeding would proceed in the name of Local 73, and the successorship application would, by necessity, be dismissed. An agreed Statement of Facts was placed before the Board for the purpose of the motion, and the motion was thereupon argued by counsel on basis of the facts stipulated therein. At the conclusion of argument the Board reserved its decision.
- 3. By way of decision dated June 26, 1995, the Board determined that there had not been, at any time, a proper withdrawal by Local 73 from the International. As a result of that determination, the application pursuant to section 63 of the Act was dismissed, and the application for certification and the application to combine bargaining units are to proceed, in the name of Local 73 (now subject to a trusteeship imposed by the International). The Board determined that the unfair labour practice complaint could proceed, if desired by Local 73 and the International.
- 4. These are the reasons for the decision reached by the Board.

II. The Facts

5. The agreed Statement of Facts placed before the Board, for the purposes of the preliminary motion, read as follows:

Statement of Facts

- 1. Hotel Employees & Restaurant Employees International Union (the "International") is an international trade union with approximately 300,000 members across Canada and the United States. It is affiliated with the AFL-CIO and the CLC.
- 2. Hospitality, Commercial & Service Employees Union, Local 73 chartered by the Hotel Employees & Restaurant Employees International Union ("Local 73") is a trade union affiliated with & chartered by the International Union. Local 73 was granted a charter by the International on September 1, 1990. Local 73 has approximately 114 members in six bargaining units in Thunder Bay, Ontario.
- 3. Local 73 is governed by the Constitution of the International as well as its own bylaws. At all material times the contents of the International's Constitution & Local 73's bylaws were as represented in Schedules "1" and "2" of the Intervention in Board file No. 3842-94-R (Section 63 Application) filed on behalf of Local 73 and the International.
- 4. A petition, signed by 90 members of Local 73 requesting Local 73's executive to hold a meeting to consider a resolution that Local 73 disaffiliate from the International, was presented to the executive of Local 73 on November 30, 1994 at a Special Executive Board Meeting. At this meeting, the executive decided to hold a meeting of Shop Stewards on December 7, 1994 to determine the level of support for disaffiliation and to hold a special general meeting of the membership on December 12, 1994. The petitions are at Schedule 1 of the Application in Board File No. 3842-94-R and the minutes of the November 30, 1994 executive meeting are at Schedule 2.
- 5. On December 5, 1994 a notice of the special general meeting was posted at each workplace and mailed by regular mail to each member of Local 73 and received by them within a day or two. No notice was mailed to the International. A copy of the notice is at Schedule 4 of the Application in Board file No. 3842-94-R.
- 6. Including members of Local 73's executive, 31 of Local 73's 114 members attended the special general meeting on December 12, 1994 in Thunder Bay.

- 7. At this meeting a motion was made to withdraw Local 73 from the International and dissolve the Local's affiliation with the International. This motion was seconded and the members were called on to vote by a show of hands but no one requested a ballot vote. The motion carried unanimously. The minutes of the December 12, 1994 special general meeting and the various motions are at Schedules 5 to 9 of the Application in Board File No. 3842-94-R. Included in these motions is a motion passed to change the name of the local from Hospitality, Commercial & Service Employees Union, Local 73 to Hospitality, Commercial & Service Employees Union, of Canada ("Hospitality Canada").
- 8. At a meeting held on December 15, 1995 a new constitution was adopted. Notice of the meeting was posted on December 13, 1995 at all workplaces and mailed to each member by ordinary mail on the evening of December 12. Twenty-three members attended and voted unanimously to accept the new constitution. Refer to Schedules 10 & 11 of the Application.
- 9. By letter dated December 21, 1994 the International Union was advised that Local 73 had withdrawn from the International Union (attached as Schedule 14 of the Application in Board File No. 3842-94-R).
- 10. On November 30, 1994, an Application for Certification was filed by Hospitality, Commercial and Service Employees Union, Local 73, chartered by Hotel Employees and Restaurant Employees International Union for certain front-office employees of the Victoria Inn (Board File No. 3154-94-R).
- 11. On December 12, 1994 the Victoria Inn filed an application pursuant to the combination provisions of the *Act* in which it is seeking to combine the employees in Board File No. 3154-94-R with an existing group of employees for whom Local 73 has for years held bargaining rights.
- 12. On January 20, 1995 the Applicant in Board File No. 3154-94-R requested the Board amend the name of the Applicant Union from Hospitality, Commercial and Service Employees Union, Local 73, chartered by Hotel Employees & Restaurant Employees International Union to Hospitality, Commercial and Service Employees Union of Canada. The Board has not ruled on that request.
- 13. On February 17, 1995 the General President of the International appointed Mr. Edward Goralski as International Trustee of Local 73. To date, Mr. Goralski has been managing the affairs of Local 73 on behalf of the International.
- 14. The collective agreement with the Victoria Inn refers to the union party as "Hospitality, Commercial and Service Employees Union, Local 73, chartered by the Hotel Employees and Restaurant Employees International Union".
- 15. On February 24, 1995 Hospitality Canada filed with the Board a petition signed by six individuals indicating they wished to be members of Hospitality Canada. These signatories are employees of the Victoria Inn.
- 16. Hospitality Canada is not affiliated with any trade union, council of trade unions or central Labour body including the Ontario Federation of Labour, the CLC, and the Thunder Bay & District Labour Council.
- 17. The parties agree that the foregoing statement of facts, as set out herein, is stipulated without proof and only for the purpose of considering the preliminary arguments raised by Local 73 and the International Union. In the event that the Board should find, on the basis of the stipulated facts, if proven that Hospitality Canada would have acquired the bargaining rights of Local 73 or would be entitled to proceed with Board File No. 3154-94-R as Applicant in its own name, then the Board shall proceed with the hearing and neither of the parties are entitled to rely on any of the facts stipulated herein nor are they bound by the facts as stipulated herein except to the extent that they are proven in the course of the hearing on the merits.

For the purposes of this decision, we will refer to the Hospitality, Commercial and Service Employees Union of Canada as "Hospitality Canada".

6. The relevant constitutional provisions of the International which governed the parties at the relevant times read as follows:

Article XI

Section 1. Issuance of Charters.

Twenty-five or more persons may apply to the International Union for a charter of affiliation as a Local Union. The application shall be accompanied by a remittance of Fifty (\$50.00) Dollars. Upon approval of the General Executive Board, the charter may be granted.

Section 2. Bylaws.

- (a) Local Unions shall be required to enact their own bylaws; provided, however, that such bylaws may not conflict with the International Constitution, Federal, State or Provincial laws, and are approved by the General President as provided in (b) of this Section.
- (b) All Local Unions shall submit bylaws and amendments thereto to the General President for approval and these shall become effective on the date final approval is given thereof by the General President. Such approval shall not foreclose the General President from ordering changes or elimination of provisions if at any time thereafter it is found that such provisions are in conflict with the International Constitution or applicable laws.

Section 15. Withdrawal.

Withdrawal of a Local Union from the International Union may not take place as long as three members of the Local object.

Section 16. Defunct Locals.

(a) When the charter of a Local Union is revoked, or should a Local Union dissolve, be suspended, withdraw, disaffiliate or forfeit its charter, the Local Union and its officers shall be required to turn over all books, documents, property, and funds, to the International Union. Such records and property shall be held in trust until such time as the Local Union may be reinstated or reorganized, or shall be used to organize a new Local Union.

The relevant by-laws of Local 73 which governed Local 73 at the relevant times read as follows:

ARTICLE XIII

AMENDMENTS

Section 1. All proposed amendments to these bylaws must be in writing, proposed by the Executive Board or signed by fifty (50) members in good standing with the Local and read at two (2) consecutive meetings and voted upon at the second (2nd) meeting. After the first reading, the proposed amendment must be posted on the bulletin board until final action. A two-thirds majority vote of members present at the second (2nd) meeting shall be required to adopt an amendment. No amendment shall become effective until approved by the General President.

Section 2. The procedure outlined in Section 1 above shall be fully applicable to amendments providing for an increase in dues or initiation fees, except it shall require a majority vote by secret ballot on such second (2nd) meeting day after reasonable written notice of intent to vote on the increase is given to the membership. The amendment, as set forth in the notice, is not subject to change after the notice is sent.

ARTICLE XIV

INTERNATIONAL CONSTITUTION

Section 1. The terms and provisions of the International Constitution and any amendments thereto shall be binding upon this Local Union, its officers and members, as if fully set forth herein.

<u>Section 2.</u> Any provisions of these bylaws which are in conflict with the International Constitution or Provincial or Federal law shall be of no force or effect.

III. Decision

- 7. In our view, the determination of the issue placed before us on the preliminary motion is governed by the decision of Stamos et al. v. Jean-Guy Belanger et al., (October 3, 1994) an unreported decision of Adams J. sitting in Motions Court of the Ontario Court, General Division. In Stamos, the Court was asked by the plaintiffs in two separate proceedings to grant both an interim and an interlocutory injunction against a number of individual defendants who had sought to withdraw Hotel Employees and Restaurant Employees International Union, Local 75 (hereinafter "Local 75") from the International. In the main action, the plaintiff Stamos (the trustee appointed by the International to govern the affairs of Local 75) sought an order that the defendants turn over to the International the assets of Local 75 and that the bargaining rights of Local 75 be turned over to the trustee. The defendants resisted the application, in part, by asserting that they had acted in accordance with the constitution and by-laws of the International and of Local 75, respectively, when withdrawing Local 75 from the International. The defence to the injunction applications was that, in light of the defendants' compliance with the aforementioned constitution and by-laws, no prima facie case existed to support the ordering of an interim or interlocutory injunction.
- 8. In the course of rendering his decision in *Stamos*, Adams J. made reference to the constitution of the International and the by-laws of Local 75. They are, in all relevant respects, identical to the constitutional provisions and by-laws which governed the rights and duties of the parties before us.
- 9. As noted above, Local 75 resisted the application for an interim injunction by asserting compliance with the constitution and by-laws of the International and of Local 75, respectively. Mr. Justice Adams disagreed with that assertion. At pages 39 and 40 of his reasons for decision, Adams J. notes as follows:

This brings me to the claim of the plaintiffs that proper notice of the proposed withdrawal was not given to the members. For the purposes of this case, I will accept the defendants' submission that the plaintiffs must demonstrate a *prima facie* or even a strong *prima facie* case of alleged breach given that the issuance of an interlocutory injunction could well dispose of the differences between the parties. However, I disagree with the defendants that they acted in compliance with the constitution and by-laws of the International and the local. Indeed, I find the plaintiffs have established a strong *prima facie* case of the breach of fundamental constitutional provisions lying at the heart of this contractual relationship.

Article XI, Section 15, of the International's constitution embodies a fundamental guarantee. In my view, all members have an individual right to clear and specific notice of any contemplated withdrawal action. If a proposed increase in union dues attracts the special procedures of proposed amendments to the by-laws but with the additional requirement of a secret ballot vote, so does a proposed withdrawal. I am of the opinion it would be entirely unreasonable not to imply the most rigorous notice and voting procedures set out in the constitution. It is not surprising that those drafting the constitution of the International did not set out expressly all the rules involved in its breakup. This silence cannot be purposefully construed as an intention that the

issue of a local's withdrawal might be treated as just another item of union business at a regular membership meeting. See Faulds v. Hesford [1957] 10 D.L.R. (2d) 292 (S.C.B.C.) at pp. 306-7.

Accordingly, it was the view of Adams J. that Local 75 could not withdraw from the International without complying with the most rigorous notice and voting procedures set out in the constitution. We are of the view that these proceedings ought to be determined by reference to the decision of Adams J. in *Stamos*.

- 10. On the facts of our case, those individuals who desired to effect a withdrawal of Local 73 from the International observed a number of the notice and voting requirements contained in the International's constitution and the by-laws of Local 73. However, counsel for the International and for Local 73 noted during argument a number of deficiencies in the notice and voting procedures adopted by those effecting the withdrawal of Local 73 which he asserted could establish non-compliance with "the most rigorous notice and voting procedures" contained in the constitution and by-laws. It is evident that at no meeting where the issue of the withdrawal of Local 73 from the International was considered by the membership present was there a secret ballot vote, as compliance with the most rigorous notice and voting procedures set out in the constitution and by-laws would require. For that reason alone (and we make no comment on the other alleged deficiencies asserted during argument) we conclude that the purported withdrawal by Local 73 from the International was ineffective at law.
- 11. Counsel for Hospitality Canada submitted during argument that the decision of Adams J. was distinguishable, on the basis that the Local 75 "withdrawal" from the International was, in reality, a "palace coup", whereas the situation involving Local 73 was more properly characterized as a "membership revolt". Furthermore, counsel pointed to Article XI, Section 16 of the International constitution, which distinguishes between the "withdrawal" of a local union from the International, and the "disaffiliation" of same, and submitted that what those who wished to leave the International really did here was to "disaffiliate" from the International. As there are no "notice and voting procedures" contained in the constitution and/or by-laws respecting "disaffiliation" from the International, the steps taken by those desiring to leave the International were sufficient to effect that desire, as they were taken "reasonably, fairly, and democratically". Finally, counsel submitted that the comments made by Adams J. in *Stamos* were *obiter dicta*, inasmuch as the issue before him was "who gets the property" rather than "who gets the bargaining rights", which is the issue here.
- 12. These arguments do not persuade us that the standard determined by Adams J. in *Stamos*, *supra*, ought not to apply to the circumstances of these proceedings. It does not appear to us that the notice and procedural standards determined to be appropriate by Adams J. in *Stamos* were necessarily founded upon the allegations made respecting a "palace coup" that permeated that proceeding. It is highly likely that the standards dictated by the *Stamos* case would preclude a "palace coup" from occurring in the future. However, it is not evident to us that the standard adopted by Adams J. was, in any way, limited only to those cases which can be considered to be "palace coups"; common sense would suggest quite the opposite conclusion.
- 13. We do not find the distinction drawn by counsel between the concepts of "withdrawal" and "disaffiliation" to be a meaningful one. It is true that the article of the International's constitution referred to by counsel during argument appears to distinguish between the concepts of "disaffiliation" and "withdrawal" from the International. That being said, it is not clear to us what distinction can meaningfully be drawn between those two concepts. Counsel, in response to a question from the Board during argument, suggested that the distinction between the two concepts lies in the fact that by "disaffiliating" the local union exists as it did before, as a separate trade union, but is merely no longer affiliated with the International. What was not explained, though, is

how that status differs from the same local union "withdrawing" from the International. In those circumstances, the local union which withdraws still "exists as it did before", as an independent trade union. The "before" and "after" pictures appear to us to be identical in both scenarios.

- 14. Even if we are wrong, however, it would appear to us that on the facts of this case those desiring to leave the influence of the International attempted to effect same by way of a "withdrawal" rather than by a "disaffiliation" as was asserted during argument. The Minutes of the meeting of Local 73, held on December 12, 1994, reflects that the following motion was made and voted upon by those members present:
 - 14. It was moved by Tony Lillington, and seconded by Eva Tremblay that the Hospitality, Commercial and Services Union, Local 73, withdraw from the International and dissolve the affiliation with the Hotel Employees and Restaurant Employees International Union and become an independent all Canadian Union which was unanimously passed.

(emphasis added)

It is apparent, therefore, that the intention of those desiring to leave the aegis of the International was to depart by way of "withdrawal". If anything, the wording of the motion (and its reference to dissolution of the local union's "affiliation" with the International) merely serves to confirm the apparent identity of concept between "withdrawal" and "disaffiliation".

- 15. Finally we disagree that the comments of Adams J. were made in *obiter*. It is evident from a plain reading of the decision that control of both Local 75's property rights and of its bargaining rights were in issue before Adams J. It was necessary for Adams J. to deal with the issue of proper notice to employees to reach the decision he did on the injunction applications. When dealing with that issue, Adams J. determined that the constitutional provisions of the International and the by-laws of Local 75 implicitly require a certain standard of notice and voting procedures to be observed in order to effect a proper withdrawal from the International. The standards determined by Adams J. were clearly part of the *ratio decidendi* of that decision and there is no reason to not apply those standards to the proceedings before us.
- 16. For all of the above reasons, we ruled as we did on June 26, 1995.
- 17. The Board has received correspondence from two different law firms purporting to act for Hospitality Canada. Each has indicated a desire to request reconsideration of this decision. The Board will entertain *one* such request on behalf of Hospitality Canada, if filed with the Board within thirty days of the date of these reasons for our earlier decision. Should there be no request for reconsideration filed with the Board within the thirty day time period, the remaining matters in dispute will be scheduled for hearing.
- 18. This panel is not seized.

1501-95-G; 1531-95-U; 1602-95-U The Carpenters Employer Bargaining Agency ("EBA"), Applicant v. The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America ("OPC") and Drywall Acoustic Lathing and Insulation, Local 675 ("Local 675"), Responding Parties v. Doug Bickle, Henry Bickle, Roy Williamson, Victor DaSilva, Ivo Bodlovic and workers listed in appendix A and other relevant workers, Intervenor; Interior Systems Contractors Association of Ontario ("ISCA"), Applicant v. Drywall Acoustic Lathing and Insulation, Local 675 ("Local 675"), Responding Party v. Doug Bickle, Henry Bickle, Roy Williamson, Victor DaSilva, Ivo Bodlovic and workers listed in appendix A and other relevant workers, Intervenor; Doug Bickle, Henry Bickle, Roy Williamson, Victor DaSilva, Ivo Bodlovic and workers listed in appendix A and other relevant workers ("objecting employees"), Applicants v. Drywall Acoustic Lathing and Insulation, Local 675 ("Local 675"), The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America ("OPC"), United Brotherhood of Carpenters and Joiners of America (the "International"), Helmut Redermeier and Collin Weller and Jim Smith, Responding Parties

Collective Agreement - Construction Industry - Construction Industry Grievance - Duty of Fair Representation - Duty to Bargain in Good Faith - Settlement - Trusteeship - Unfair Labour Practice - Carpenters' union Local 675 and Interior Systems Contractors' Association apparently entering into settlement revising provisions of existing collective agreement in ICI sector and establishing new collective agreement covering residential sector - Carpenters' Ontario Provincial Council, however, refusing to agree to ICI changes - Board finding, therefore, that settlement purporting to deal with ICI items of no force and effect - Bargaining parties never intending that there would be stand alone residential agreement, separate and distinct from situation in ICI sector - Accordingly, Board holding that when proposed ICI amendments rejected, basis for residential agreement discarded - Board finding that business manager acting in what he believed to be best interests of Local 675 and its members when he signed collective agreement without seeking member ratification - Business manager, however, violating duty of fair representation in assuring membership that he would not sign collective agreement granting concessions without consultation or ratification by members - Board finding that trusteeship imposed on Local 675 for just cause and that breach of section 84 of the Act, if any, a technical one for which no remedy necessary

BEFORE: R. O. MacDowell, Alternate Chair.

APPEARANCES: Joseph Liberman for ISCA; Bruce Binning for the Provincial Employer Bargaining Agency; Norm Jesin for Carpenters Local 675 and Carpenters' Ontario Provincial Council; Martin Rosenbaum and David Conn for the objecting employees.

DECISION OF THE BOARD; August 15, 1995

Ι

Introduction

1. These are related applications brought against the union under sections 91 and 126 of the Labour Relations Act.

- 2. In order to make this decision easier to read, I will refer to the parties in the "shorthand way" that they commonly refer to each other. Local 675 of the United Brotherhood of Carpenters and Joiners of America will be referred to simply as "Local 675"; the Interior Systems Contractors Association of Ontario will be referred to as "ISCA"; the Acoustical Association of Ontario will be referred to as "AAO"; the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America will be referred to as "the OPC"; the Labourers International Union Local 183 will be referred to as "Local 183" or "the Labourers"; and so on.
- 3. It is apparent from their behaviour that the employees affected by this proceeding may not understand either the legal framework that governs their situation, or the collective bargaining context within which their rights must be determined. While I have tried not to burden this decision with a lot of quotes from the cases referred to in argument, I do think it is necessary to discuss the collective bargaining environment in some detail.

H

The Proceedings Leading up to the Present Case

4. This case came on for hearing on an expedited basis because of the uncertainty and unrest that currently prevails in certain parts of the construction industry. It is, in fact, the third Board proceeding involving these parties. All three cases arose from an unsettled situation in the drywall industry, where there is a dispute about whether recent negotiations have produced new and binding collective agreements.

The First Unlawful Strike Application

- 5. In Board File No. 0191-95-U ISCA complained that employees were engaging in unlawful strikes and that union officials were encouraging that unlawful conduct. After hearing the parties' evidence and representations, the Board found that employees were indeed striking unlawfully. The Board issued a "cease and desist direction" taking the trouble to explain to employees that no strikes or picketing were lawful at this time.
- 6. The Board noted that employees cannot strike while a collective agreement is in force; nor can employees strike after a collective agreement is *expired*, until the compulsory conciliation process has been concluded. The Board observed that if there was some legal controversy between the parties, it had to be resolved in accordance with the procedures set out in the *Labour Relations Act*.

The Second Unlawful Strike Application

- 7. The Board's cease and desist direction was not the end of the problem. On July 14, 1995 ISCA complained that the unlawful strikes were still continuing despite the Board's earlier direction. ISCA submitted that the employees knew that they were breaking the law and were ignoring the Board's order. ISCA submitted that the strikes were being organized by a few instigators who were pursuing their own political agenda.
- 8. ISCA submitted that the only way to end the disruption was to prosecute the individuals causing it. Section 98 of the Act provides that unions and employees engaging in an unlawful strike may be liable for fines of up to \$2,000.00 a day for individuals and \$20,000.00 a day for trade unions; moreover the Board had pointed that out in the first decision that it had issued. ISCA sought the Board's consent to prosecute.

- 9. However, as it turned out, the Board did not have to proceed with the consent to prosecute application. The matter was settled on terms set out in more detail in its decision of July 20, 1995.
- 10. Among those settlement terms was an undertaking by all parties (including the objecting employees) to put their legal positions before the Board as soon as possible. The parties agreed that if there was some dispute about the way that the union was behaving, or whether there was a valid collective agreement in place, that dispute should be put before the Board for determination. The parties (including the objecting employees) acknowledged that strike activity was unlawful at this time.
- 11. It was not clear how quickly the case could be completed. The parties said that the issues were novel and complex. Everyone wanted a full opportunity to call evidence and cross-examine witnesses. However it was understood that, pending the Board's determination, there would be no more illegal conduct.
- 12. The parties initially estimated that it would take three days to hear their case. Ultimately it took eight days. Argument was completed on the evening of August 8, 1995.

- 13. I will examine the facts surrounding the dispute in some detail below. First, it may be useful to briefly describe the legal framework that governs construction industry collective bargaining.
- 14. It is clear that the institutional parties (ISCA and the union) are quite familiar with the collective bargaining scene. These parties understand the pressures in the market-place, the terms of their various collective agreements, and their rights and obligations under the *Labour Relations Act*.
- 15. However, it is equally clear that the rank and file union members may not understand either the law or the relevant collective bargaining history. Accordingly, it may be worth a brief digression to sketch in some of the background to the latest round of bargaining. Unless one understands the collective bargaining environment, one will not understand what this dispute is really about.

Ш

The Collective Bargaining Framework: How Negotiations are conducted in the ICI and Residential Sectors of the Construction Industry

- 16. Since 1978 collective bargaining in the industrial, commercial and institutional sector (ICI) of the construction industry has been conducted on a province-wide basis. But that is not a voluntary arrangement. In 1977, the *Labour Relations Act* was amended so as to *require* province-wide bargaining, by trade, through provincial employer and employee bargaining agencies designated by the Minister of Labour.
- 17. The designated provincial bargaining agencies are the "key players" in the ICI sector. Local bargaining is strictly prohibited unless the provincial bargaining agencies agree to permit it, and confirm the results (see section 148 of the Act). Without agreement at the provincial level, local arrangements are null and void.
- 18. The general framework for bargaining can be described quite simply.

- 19. On the "employer side" of the bargaining table, there is a *designated* provincial bargaining agency (which I will call the "EBA"). The EBA typically consists of one or more employer associations. Each employer association is made up of a number of employers sharing common business interests. The EBA is an umbrella group that is designated to bargain for unionized employers on a province-wide basis.
- 20. On the "union side" of the bargaining table is the *designated* provincial bargaining agency which is usually a council of unions. It too is an umbrella organization that includes or represents geographic locals, district councils, and, sometimes, the parent union.
- 21. Every three years, the designated provincial bargaining agencies union and employer negotiate a new collective agreement. That agreement covers the unionized employers and employees in their trade group (carpenters and carpentry contractors, electricians and electrical contractors, bricklayers and masonry contractors etc.). The collective agreement applies to the ICI sector and covers the whole Province of Ontario.
- 22. The provincial agencies that do the bargaining have an independent existence, that is rooted in the statute and the Minister's designation. The designated agencies are distinct from their component parts. The provincial bargaining agencies owe their constituents a "duty of fair representation" (see section 154 of the Act), which reinforces the impression that they are truly independent actors.
- 23. Local 675 (Toronto) is only *one* of the local unions that is covered by the ICI collective agreement. Local 675 is represented in ICI bargaining by the Carpenters' Ontario Provincial Council-"the OPC". So are the other carpenters' branches across the province. The OPC speaks for all of them.
- 24. Since 1978, then, ICI bargaining has taken place at the provincial level. For each trade, the bargaining has resulted in an Ontario-wide agreement, covering all workers in that trade. But of course, the local construction scene is different in various parts of the province. And not all members of the trade union do the same kind of work. These geographic and industrial variations have to be reflected in the terms of the provincial agreement.
- 25. In other words: the bargaining and collective agreement are provincial in scope, and are the responsibility of the designated provincial bargaining agencies. But the actual *terms* of the collective agreement have to be adapted to reflect local circumstances and different working arrangements. The provincial collective agreement is a mosaic of inter-related parts, each applying to a particular locality and/or a particular segment of the construction industry where members of the carpenters' union work.
- 26. The carpenters' provincial collective agreement reflects that complexity. It is almost 300 pages long, and is colour-coded so that the reader can find the terms that apply to his particular part of the industry.
- 27. The provincial ICI agreement begins by identifying the parties who have bargained it (the designated provincial bargaining agencies) and the agreement's overall purpose:

AGREEMENT

BETWEEN

LABOUR RELATIONS BUREAU OF THE ONTARIO

GENERAL CONTRACTORS ASSOCIATION

ACOUSTICAL ASSOCIATION OF ONTARIO

RESILIENT FLOORING CONTRACTORS

ASSOCIATION OF ONTARIO

CAULKING CONTRACTORS ASSOCIATION OF ONTARIO INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA INDUSTRIAL SYSTEMS CONTRACTORS ASSOCIATION OF ONTARIO

(hereinafter called the "Carpenters Employer Bargaining Agency" EBA)

AND

THE ONTARIO PROVINCIAL COUNCIL of the United Brotherhood of Carpenters and Joiners of America on behalf of the following affiliated bargaining agents:

- (1) The Carpenters District Council of Toronto and Vicinity,
- (2) Lake Ontario District Council,
- (3) Western Ontario District Council,
- (4) Ontario Acoustical and Drywall District Council,
- (5) United Brotherhood of Carpenters and Joiners of America; and the following Local Unions: 18, 27, 93, 249, 397, 446, 494, 572, 675, 785, 1071, 1256, 1316, 1450, 1669, 1946, 1988, 2041, 2050, 2222, 2451, a d 2486, of the United Brotherhood of Carpenters and Joiners of America; and any Local Union or District Council subsequently chartered in Ontario.

(hereinafter referred to as the "Union")

ARTICLE 1 - PURPOSE

Whereas the EBA is a designated employer bargaining agency and as such represents employers for whom the Union has bargaining rights for the purpose of entering into a Collective Agreement with the Union, and

Whereas the Union is an employee designated bargaining agency for employees represented by District Councils and Local Unions chartered by the United Brotherhood of Carpenters and Joiners of America and the said international for the purpose of entering into a collective agreement with the EBA, and

Whereas the EBA and the Union are desirous of establishing a collective bargaining agreement in order to promote uniform standards for all employees covered by the Collective Agreement and to promote an atmosphere of peace and harmony among the EBA, the Union, the Employers, District Councils, Local Unions and employees and to provide for the peaceful settlement of all disputes and grievances that may arise. ...

28. The opening words of the ICI agreement identify the designated bargaining agencies,

the "EBA" and "the OPC" and their component parts that are bound by the agreement. The rest of the agreement settles the terms that apply to the segments of the construction industry in which members of the carpenters' union are employed.

- The "master portion" of the agreement (the white pages 1-60) consists of general terms that generally apply to all of the employers and employees bound by the agreement. (I say "generally" because the appendixes sometimes modify the "master language"). The blue pages (61-167) contain schedules of wages and conditions for "general carpentry" work, in local geographic areas where the union has local branches (for example: Local 785 Cambridge, Local 18 Hamilton and Niagara, Local 249 Kingston, Local 93 Ottawa, etc.). There is also a "Caulking Appendix" (the pink pages 226-234), a Resilient Floor Workers' Appendix (green pages 235-274), and an "Acoustic and Drywall Appendix" (yellow pages 168-335) which set out the terms applicable to those parts of the industry.
- 30. The "Acoustic and Drywall Appendix" applies to employers and employees who do that kind of work. Like the other appendices, it is negotiated by or on behalf of the provincial bargaining agencies (the EBA and the OPC).
- However, for practical purposes the "employer side" that is bound by the appendix consists of the contractor members of AAO and ISCA who also have an important influence on what the appendix contains. On the "union side" the appendix binds carpenters locals 785, 18, 249, 1316, 2041, 1256, 1988, 446, 2466, 675, 494, the Lake Ontario District Council (Peterborough, Oshawa, Belleville, Cobourg. And, of course, it also binds the members of these union locals who do drywall installation and acoustical ceilings.

- 32. The *Labour Relations Act* contemplates that there must be a three year provincial collective agreement. There can be no strikes or lock-outs while the 3-year agreement is in place. And, once the 3-year agreement is signed, neither party can insist on amending it.
- 33. On the other hand, it is not unusual for the bargaining parties to amend an existing collective agreement. The *Labour Relations Act* contemplates that this can be done, providing that the bargaining parties are in agreement (see section 53(5) of the Act). The Act specifies the duration of a collective agreement and prohibits early termination, but it allows the parties to adjust particular terms to meet their mutual needs.
- 34. It is sometimes sensible to renegotiate portions of the agreement if economic conditions change. That is particularly so in the construction industry, where the market is volatile, where contractors obtain work by competitive bidding, and where there is often stiff competition from non-union companies. It makes sense for the parties to keep unionized companies competitive, because if they are not competitive, the contractors will be out of business and their employees will be out of a job.
- 35. The carpenters' provincial collective agreement specifically contemplates the possibility of amendment, either on the provincial level, or in a segment of the industry, or in a local area. The provincial agreement has "built in" flexibility. Article 28 of the agreement reads as follows:

ARTICLE 28 - AMENDING

28.01 The terms and conditions of this Collective Agreement may be changed or amended by written agreement between the EBA and the OPC.

28.02 Any changes or amendments agreed to by local employer associations or trade associations and local unions or district councils shall not be effective unless and until such change or amendment has the written agreement of both the OPC and the EBA. Any change or amendment shall only be effective in the geographic area involved.

- 36. Article 28 stipulates that in order for there to be a valid amendment to the agreement, the provincial bargaining agencies must both agree in writing. In other words, any amendment to the provincial ICI agreement requires the consent of the parties who negotiated the agreement in the first place. But apart from that, the collective agreement provides no guidance as to the form, the timing, or the circumstances in which that consent may be sought, or granted or withheld. All it says is that there cannot be an amendment unless the provincial agencies agree to it.
- 37. I should perhaps repeat here that Article 28 deals with variations that are made, by mutual consent, during the life of the ICI collective agreement. Such amendments do not bring the ICI agreement to an early end. There still can be no strike or lock-out to force the other party to agree to changes of this kind. Nor is there any statutory obligation to "bargain" about mid-term amendments. If such discussions occur, it is because the parties believe that it is in their interest to negotiate.

38. The situation in the residential sector is a little different.

- 39. In the residential sector, there is no comprehensive compulsory provincial scheme, as there is in the ICI sector. Collective bargaining need not take place on the provincial level or produce a province-wide agreement. Nevertheless, even outside the ICI it is not uncommon for employer associations and trade unions to enter into extended area agreements and those agreements may be provincial in scope.
- 40. ISCA and Local 675 are an example of that. ISCA and Local 675 have a province-wide "residential" agreement pertaining to the installation of drywall, acoustic panelling, lathing and insulation in the residential sector of the construction industry.
- 41. ISCA is an accredited employer association (see sections 127-136 of the Act) representing unionized contractors who operate in the drywall lathing and acoustical ceiling business. Local 675 represents a majority of the drywall workers who are employed by the members of ISCA (and AAO). Every two or three years ISCA and Local 675 negotiate a province-wide *residential* agreement. They have been doing that since 1978. The most recent residential agreement ran from June 2, 1992 until April 30, 1995.
- The ICI agreement and the residential drywall agreement are both provincial in scope. The term of the 3-year residential agreement parallels the term of the 3-year ICI agreement. In fact, the most recent residential agreement terminated on the same date as the ICI agreement. That is not a coincidence.
- 43. Many of the drywall contractors who belong to ISCA operate in both the ICI and residential sectors of the construction industry. Their employees can work in either sector, or move back and forth. The employees are doing the same work regardless of what sector the project is in.
- 44. It therefore makes sense for residential and ICI bargaining to move in tandem. The negotiated wage rates are related. The sectors are different; but the drywall business involves the

same unionized companies, the same local union, the same union members, and the same kind of work. That is why the union and the contractors have always bargaining the ICI and residential agreements *together*.

- 45. I have referred to the employers as "contractors", because that is the way that they usually describe themselves. However, that is also the way that they do business. They enter into "contracts" to do the drywall work on projects controlled by builders or general contractors.
- 46. The builders are the ultimate source of the work, for the drywall contractors and for the employees who work for those contractors. It is the builder who decides *which* drywall contractor will be on the job site. That selection can be made on the basis of competitive bidding, or because the builder favours particular drywall companies that it has dealt with in the past, or because the builder has arrangements with a particular union that require it to direct work in a particular way. And, of course, the builder is concerned about cost, and ensuring that the work it has subcontracted will be done on time, and without undue disruption. The builders take that into account when they decide what contractor to engage.
- Work can be steered to a contractor for a variety of reasons. But ultimately it is the builder who makes that decision. That means that both the drywall contractors and the carpenters' union must be sensitive to what the builders need. If the builders are not happy, the work will go elsewhere. The carpenters' union does not "own" the work.
- I make this observation because some of the objecting employees seem to believe that they are somehow "entitled" to do drywall work on a particular builder's project simply because they have done that kind of work before. They seem to believe that there is no relationship between their wage rates (over \$30.00 an hour) and the availability of work. They seem to believe that wildcat strikes that disrupt a work site will have no effect on the builders' appetite to have them back. They seem to believe that if they go on a lawful strike, no one else will do the work.
- 49. They are wrong on all counts.
- 50. It is also important to appreciate that the contractors organized by the carpenters union are not the only players in the market-place. There are a number of *non-union* contractors who can also bid for available work, and their costs may be well below those of unionized companies. In addition, in recent months Labourers Local 183 has shown an interest in organizing in the drywall industry displacing the carpenters union wherever it can.
- 51. Companies unionized by the carpenters now face serious non-union competition, as well as competition from companies unionized by Local 183. To put the matter another way: dry-wall workers represented by the carpenters union now face competition from non-union workers (who may be prepared to work for a lower wage rate) and from members of Labourers Local 183 especially if Local 183 can offer other advantages to builders or persuade the builders to deal with Local 183 or companies unionized by Local 183. (For an example of one such "top down" arrangement, diverting work to a particular union, see the situation discussed by the Board in *Metropolitan Apartment Builders' Association*, [1978] OLRB Rep. Nov. 1022; aff'd 24 O.R. 2d 394 (Divisional Court)).
- 52. And, in recent times, the construction industry has been slow. There has not been enough work to go around.

IV

What this case is about

53. It is fairly easily to summarize what this case is about.

The Employers Complaint

- 54. ISCA contends that for the last several months, it has been bargaining with the union with a view to amending the ICI agreement, and settling a new residential agreement. Both sectors were "on the table".
- 55. ISCA submits that in late June 1995, there was a general settlement. ISCA says, that the settlement did two of the things:
 - 1. it revised some of the provisions of the existing (1995-98) collective agreement in the ICI sector;
 - 2. it established a *new* collective agreement covering the residential sector.
- ISCA submits that, in ICI and residential, the union made wage concessions in return for strong "policing language" that would ensure that contractors adhered to the negotiated terms of the collective agreement (a serious problem in recent years). The wage concessions were significant. But so were the new penalties to prevent contractors from "cheating" on the wage rates. "Cheating" has been a growing problem in recent years. (see below)
- The employers maintain that there are now binding collective agreements covering both the ICI and residential sectors of the construction industry: the ICI agreement as amended by the June settlement, and a new residential agreement that was also created by that settlement. It follows that there can be no strike or lock-out in either sector until 1998. The revised wage package will remain in effect for at least 9-12 months until negotiated "wage reopener" provisions are triggered. A reopener was also part of the settlement.
- 58. The employers seek a Board decision confirming their legal and collective bargaining position.
- 59. In the section 126 application the employers seek a declaration that the ICI agreement has been properly amended and is binding upon the union and its members.
- 60. In the section 91 complaint the employers allege that the union is breaching its "duty to bargain in good faith", because it is failing to execute a residential agreement along the lines that have already been agreed upon.

The Employees' Complaint

- 61. In response to the proposed wage rollback contained in the alleged settlement, employees have engaged in widespread unlawful strikes. That is what triggered the applications that I referred to above. However, in these proceedings, the objecting employees also challenge the legal basis for what ISCA says has happened. The objecting employees challenge both the conduct of their union and the validity of the alleged settlement.
- 62. Briefly put, the objecting employees argue that the persons bargaining on behalf of the

union had no authority to enter into the June settlement. They argue that concluding a settlement without reference to the union membership was contrary to the union's 'duty of fair representation'. They also argue that the settlement flows from a "trusteeship" over Local 675 that was contrary to section 138.5 of the Act, because it was imposed by the parent union without just cause. And they assert that, in all the circumstances, there was either no settlement at all, or that the Board should set the settlement aside.

- 63. Local 675 and the OPC both deny that there has been any breach of the duty of fair representation. Local 675 and the OPC also deny that there is anything wrong with the trusteeship that was imposed on Local 675 by its parent international union. In their submission, the Trusteeship was imposed for cause and the settlement was bargained in good faith, with due regard for economic realities (even if the employees may have difficulty understanding that).
- 64. However, like the objecting employees, the OPC and Local 675 argue that there was no binding settlement in June 1995, and thus no valid amendment to the ICI agreement and no new agreement in the residential sector. Accordingly, the union and the objecting employees agree on the result even though they urge the Board to get there in different ways.
- The OPC claims that Local 675 is not the provincial bargaining agency and therefore had no authority to amend the ICI agreement or bind the OPC to do so. The OPC further claims that the ICI component of the June settlement was properly rejected when the OPC found out about it and considered its terms. The OPC submits therefore, that, *insofar as the ICI sector is concerned*, there has been no valid amendment to the 1995-98 ICI collective agreement. There has been no mutual agreement as required by Article 28. In the OPC's submission, the ICI agreement and the ICI wages remain the same as they were before and will stay that way unless there is mutual written agreement to change them.
- 66. Insofar as the residential sector is concerned, Local 675 submits that there is no agreement either. Local 675 maintains that throughout the bargaining, everyone understood that there would be one "package deal" that established uniform rates for employees working in ICI and residential. That is the way that bargaining has been conducted for years. The wage rates were linked, and were intended to move together. Once the ICI portion of the settlement was rejected by the OPC, the entire package falls, because the employers always understood and insisted upon a "package deal".
- 67. In summary, then, this case requires an examination of the events preceding and following the controversial June "settlement", in order to decide:
 - 1. whether the parties have or have not effectively amended the ICI agreement;
 - 2. whether the parties have or have not effectively established a new collective agreement in the residential sector which Local 675 can be compelled to execute;
 - 3. whether the union has or has not breached its duty of fair representation; and if it has, what remedy should flow from such breach; and
 - 4. whether a trusteeship over Local 675 was properly imposed and, what remedy, if any should be given concerning the trusteeship.

 \mathbf{V}

Credibility

- Many of the facts in this case are not controversial although the parties have quite different views about their significance. However, to the extent that I have had to resolve disputed facts, or prefer the testimony of one witness over another, I have taken into account such factors as: the demeanour of the witnesses when giving their evidence; the clarity, consistency, and overall plausibility of that testimony when compared to the other oral and documentary evidence and subjected to the test of cross-examination; the ability of the witnesses to resist the tug of self-interest when framing their answers or to candidly concede facts contrary to their interest; and what seems most probable in all the circumstances. On that basis, I am troubled by some of the testimony of Doug Bickle for the objecting employees, and Rick LeCompte for the OPC.
- Now, of course, quite a bit of the evidence involved what was said or done in negotiation or union meetings, where many persons were in attendance, and much was discussed; moreover the debate spilled over from one meeting to another. One cannot expect an untrained witness to recall details which were not particularly significant at the time. In those circumstances, inconsistencies or contrary recollections are almost inevitable, and I am satisfied that some of the differences between the witnesses stem from a simple failure of memory, a disposition to "hear what one wants to hear", or a natural inclination to recast one's recollections in light of what one believes the situation "should be".
- 70. On the other hand, Mr. Bickle's memory was unusually selective suggesting that he was either not being complete candid with the Board, or that he did not understand the significance of what was going on around him.
- It is difficult to believe that Mr. Bickle worked in the drywall industry for 22 years without knowing whether the contractors who employed him were unionized. Yet that is what he said. It is difficult to believe that he did not know how long his brother had been a member of Local 675 (only a few months) and he was quite evasive on that point. It is difficult to believe that he did not know that the ongoing bargaining with the contractors involved both ICI and residential, when that matter was raised at several union meetings where Mr. Bickle said he was in attendance. It is difficult to accept that he did not know about the ongoing Local 183 raids until the end of March, or that those matters were not a serious concern at general member meetings, or that he did not understand the risk that a Local 675 strike might prompt contractors and builders to drift to Local 183. The minutes of the union meeting suggest that all of those items were canvassed regularly between February and June, because they were of serious concern to the membership. The minutes are substantially confirmed by the testimony of Helmut Redermeier the business manager of Local 675, and Roy Williamson another union member.
- 72. Similarly, Mr. LeCompte was not particularly forthcoming when cross-examined on whether the proposed ICI amendments that the OPC rejected were similar to changes that had earlier been approved. Nor was he very forthcoming when asked about the "real" reasons for the OPC's position.
- 73. In the result, I do not think that these troubling aspects of the testimony affect all of the witnesses' testimony or many of the findings of fact. But I have had to take that into account when deciding what happened and why people acted as they did. For completeness, though, I should record that I found Messrs. Thomson, Laird, Muso and Williamson to be forthright and credible witnesses even though their evidence did not always coincide. For the most part, their answers

were clear, unequivocal, prompt and confident; and I am satisfied that they were doing their best to recall what had happened and when.

VI

- With that background then, I will turn to the events that led up to the "settlement" that is here under review. Those events involve both union meetings were employer representatives were not in attendance, and collective bargaining meetings where the objecting employees were not present. They also include the raid by Labourers' Local 183, which became a growing concern for Local 675 and the contractors in the weeks preceding the settlement.
- 75. It will be convenient to review those events in chronological order, beginning in mid-1994.

VII

The Events Leading Up to the Challenged June Settlement

The Port Severn Accord

- 76. The most recent ICI and residential agreements were scheduled to expire at the same time on April 30, 1995. But neither the union nor the contractors welcomed the prospect of a new round of ICI bargaining with its inherent uncertainties and the possibility of a province-wide strike.
- 77. By 1994 the construction boom of the 1980's was a distant memory. The demand for new construction was weak, and apparently worsening. Jobs were scarce and there was fierce competition for the available work. Contractors were suffering, and many union members were out of work. It was not the best time to be negotiating a new ICI provincial collective agreement.
- 78. The situation was no better in the drywall segment of the industry. As much as 30 per cent of the market was now occupied by non-union companies up significantly from previous years. It was increasingly difficult for unionized contractors to win competitive bids. The residential market was shaky. From the contractors' perspective, it was no time for uncertainty or a work stoppage that might only benefit the non-union competition.
- In order to meet these concerns, in early 1994 the EBA and the OPC entered into negotiations with a view to the *early renewal* of the ICI agreement. The objective was to have the 1995-98 ICI agreement fall immediately into place, without a strike, when the 1992-95 ICI agreement expired on April 30, 1995. The result of these discussions was the so-called "Port Severn Agreement".
- 80. The Port Severn Agreement was described by Jim Thomson of the EBA as a "new era of bargaining and co-operation" that was intended to overcome the difficulties then faced by the unionized sector of the industry. The Port Severn accord was concluded in June 1994 and eventually ratified by the union and its Locals in November 1994. However, that ratification was neither quick nor easy. Half of the union locals initially rejected the "status quo" features of the agreement. Those Locals were uncomfortable with an agreement which, among other things, seemed to virtually freeze wages for 3 1/2 years.
- 81. The details of the Port Severn Accord [Exhibit 3] need not be set out here. It suffices to note that it involved very small ICI wage increases, together with ongoing discussions that could result in further agreements or arbitration if the parties could not agree. It was a flexible formula permitting ongoing negotiations at various levels, but limiting the number of items that could ulti-

mately be submitted to arbitration. If there was no further agreement the status quo would be maintained. The arbitrator was not permitted to lower wages below the level in the 1992-95 collective agreement.

82. In effect, the Port Severn Accord combined three more years of industrial peace with ongoing negotiations and (among other things) an arbitrable wage re-opener so that wage rates could be adjusted upwards to reflect changes in the construction market. Those ongoing discussions could include changes to the master portion of the agreement, changes to the appendices, or changes to the specific sub-divisions and schedules pertaining to drywall rates and conditions in local areas where the carpenters had local union branches (for example Local 785 Cambridge, Local 18 Hamilton-Niagara, Local 2041 Ottawa, Local 675 Toronto etc.). The Port Severn Agreement itself did not involve any wage concessions although that was a possible result of local bargaining if all of the parties were agreeable.

The ISCA - Local 675 Bargaining: ICI and Residential

- 83. The negotiations between ISCA and Local 675 took place in the shadow of the Port Severn Accord. According to Jim Thomson, the EBA permits its constituent associations complete freedom to negotiate the terms of "their" appendices. Mr. Thomson is secretary of the EBA and general manager of the Labour Relations Bureau of the Ontario General Contractors' Association.
- 84. On the employer's side, therefore, the EBA is largely a "rubber stamp". The EBA is prepared to approve what its constituent employer associations believe to be sensible for their segment of the industry.
- 85. In this case, the constituent employer associations were ISCA and AAO. Between them, these two associations represent unionized drywall contractors who deal with the carpenter's union (and perhaps other unions as well). It is ISCA and AAO that actually represented the contractors when bargaining began for new terms in the drywall industry. The items to be discussed included the Local 675 schedule of wages, special conditions, and benefits, and the apportionment of the wage total among the various trust and welfare funds operated on behalf of employees. The purpose of those discussions was to produce agreed-upon amendments to be plugged into the framework 1995-98 ICI agreement that had been put in place by the Port Severn Accord.
- 86. So far, I have been speaking only about the ICI bargaining process and aspects of the ICI collective agreement. However that is not the whole picture.
- As I have already mentioned, the distinction between ICI and residential is a little artificial in the drywall business. Unionized drywall contractors bid on jobs and do work in both ICI and residential (i.e. they enter into sub-contracts with *builders* who do ICI and residential construction projects). Similarly, drywall installers work in the ICI and residential sectors, and may move back and forth from one project to another. There is really only one "drywall industry" that is split into "union" and "non-union" contractor groups, and is now being sub-divided again into unionized contractors who deal with Local 675 or contractors who deal with Labourers Local 183.
- 88. That is why it is customary to bargain the ICI and the residential agreements together, and to make sure that the wages in the ICI agreement congruent with the wages in residential. It makes no sense to have different rates, and according to Hugh Laird of ISCA, there would be "chaos in the industry" if there were different ICI rates. The union and "Local 675 contractors" must also take into account what "non-union companies" and "Local 183 companies" are doing.

Local 675 wage rates cannot be "out of line" in comparison with the competition; because if they are, the Local 675 contractors and the Local 675 members will get no work.

- 89. The evidence establishes that the ICI and residential drywall negotiations have been conducted together since at least 1978. ISCA is the main player on the employer's side, representing about 85 companies. It is also an important constituent in the provincial EBA, which ultimately controls employer bargaining in the ICI sector.
- 90. In addition, ISCA has been "accredited" as the representative of companies in Ontario in the residential sector, who have collective bargaining relations with Local 675 (see sections 136-137 of the *Labour Relations Act*, together with the accreditation order dated April 27, 1984.) In residential, ISCA is an important player in its own right.
- 91. Local 675 (Toronto) is an influential Ontario Local and thus a component bound by the bargaining conducted by the OPC. The OPC represents a number of Ontario local unions in ICI bargaining (again see the first page of the ICI agreement). However Local 675 is the dominant player *in its own right* for the purposes of bargaining in the residential sector. Local 675 is the bargaining party to the provincial residential agreement that expired on April 30, 1995.

The Bargaining: February - June 1995

- 92. In early 1995 ISCA representatives met with representatives of Local 675 to discuss changes to the Local 675 portion of the ICI drywall appendix as well as the terms of a new residential agreement. The employers wanted a "package deal" for both sectors. The negotiations proceeded on that basis.
- 93. The employers were represented in bargaining by Hugh Laird, Bob McKean (Manager of ISCA) and Joe Liberman (counsel), together with miscellaneous individual contractors who attended bargaining meetings from time to time. Between January 1995 and the end of March 1995, the unions' principal spokesman was Gus Simone, the Business Manger of Local 675.
- 94. The negotiations took place in a context of a growing contractor concerns about the state of the market and their ability to compete at prevailing wage rates. Slack demand and growing non-union competition put the viability of their businesses in jeopardy, and promoted many companies to ignore the collective agreement altogether. Increasingly, companies were striking "deals" with employees at lesser wage rates, in order to facilitate making a lower bid. With lower wage rates, contractors could make a lower bid and get the work. At the collective agreement rates, contractors were finding it hard to compete. And when one Local 675 contractor lost out to another, the losers began to suspect that the lower bidder had a "private deal" with employees that paid wage rates lower than those in the collective agreement.
- 95. Violations of the collective agreement were widespread and were being routinely condoned by employees, who were only willing to take lower rates if the alternative was no work at all. Moreover, these practices were difficult to detect and counteract. Employees and contractors were co-operating to produce false documentation that made it a hard to check the adequacy of payments for work done (for example: "straight cheques" paid to employees without deductions or an hourly breakdown, giving employees 40 hours pay for 48 hours work, etc.).
- 96. Without solid proof or accurate documentation, it was difficult to enforce the terms of the agreement or prove that there had been a violation. And under the *Labour Relations Act* the onus is on the union to prove that a breach of contract has occurred, and to prove the amount owing to the aggrieved employee assuming the employee was prepared to grieve at all. The prob-

lem was aggravated by the volume of employee grievances (each of which required its own proceeding before the Labour Relations Board) and the fact that many of the workers did not speak English.

- In other words, in the face of deteriorating market demand and non-union competition a large number of employers and union members were prepared to strike individual bargains and work on terms inferior to those prescribed in the collective agreements. To put the matter another way: the state of the labour market was signalling that the wage rates probably should be below those set out in the current agreements. It is hard to maintain the negotiated rate if workers are prepared to work for less.
- 98. In the face of such pressures the collective agreement was beginning to unravel. For, of course, once a few *companies* began to undercut the rates to preserve their businesses or get a competitive edge, there was growing pressure for all contractors to do the same. Once a few *employees* agreed to work below the contract rates in order to get work, other employees were encouraged to do likewise. Union solidarity was being sorely strained. But so was the fabric of the employer association, which, after all, was composed of competitors who expected that banding together for collective bargaining purposes would ensure a level playing field for labour costs.
- 99. Between January and March 1995 there were a number of bargaining meetings to examine these problems and explore ways of modifying the existing agreements (ICI and residential) to accommodate these business realities. But there was no agreement reached.
- 100. Sometime in February, Gus Simone seemed amenable to a settlement formula that would include wage concessions in return for tough "policing language" that would compel contractors to comply with the agreement and would impose stiff penalties if they stepped out of line. This formula was to be embodied in both the ICI and residential agreements, and would be accompanied by parallel penalties for union members who were working below the negotiated rates. Simone was prepared to lower the rates to secure the work, provided that the contractors actually paid the rates that were agreed upon. The trade-off for wage concessions was effective policing language.
- 101. However by the end of March, the parties had not settled the magnitude of any wage concessions nor the form of the policing mechanism. There was an understanding of what a settlement might look like in general terms, but there was no agreement on the details.
- 102. In particular, there was, at that time, no suggestion that there would be major wage cuts in the Toronto area let alone the the 30 per cent rollback that the companies later demanded. And, at that point, members of the AAO were much less enthusiastic about a "policing mechanism" than members of ISCA. There was no policing language at all in the 1992-95 ICI agreement.
- 103. By about mid-March 1995, local union politics and inter-union rivalry began to intrude on the bargaining. Gus Simone defected to Labourers' Local 183 which was then beginning to "raid" Local 675 (although Simone's defection was not confirmed until late in the month). Claudio Mazzotta, President of Local 675, also defected to the Labourers'. So did several Local 675 business agents. And a considerable number of Local 675 members also joined the Labourers' union.
- The identities of employees signing with Local 183 are protected by section 113 of the *Labour Relations Act*. But there is not doubt that whatever Local 675 members may be telling Local 675 officials, quite a number of them have decided that their interests would better served by Labourers' Local 183. Local 183 has filed 9 or 10 certification applications, affecting some of the

largest drywall companies that now deal with Local 675. In each case, Local 183 asserts that a majority of employees now want Local 183 to represent them.

- 105. On March 17, 1995, Local 675 conducted its regularly membership meeting. Mazzotta was present as was Simone, who was supposedly "on vacation" at the time. However, since Mazzotta resigned at the end of the meeting, it seems pretty clear that both he and Simone had cast their lot with the Labourers' some time before that.
- 106. It was at the March 27 meeting that Doug Bickle was selected to be on the "residential bargaining committee" for the residential agreement. It is not quite clear what that "bargaining committee" was supposed to do, because it had never existed before, Simone departed shortly thereafter, and the "committee" did not actually engage in any bargaining for some time. The Local by-laws do not require a consultative body of this kind.
- 107. Doug Bickle testified that on March 27 he was "elected" by the members of the Local who attended the meeting. But, in fact, there was no vote taken. Bickle was "nominated" by some unidentified union member(s) and Simone approved of the selection with the comment "If that's what the members want ...".
- 108. At this point, Mr. Bickle had been a member of the carpenters union for only three months, and on his own testimony, had attended only one general membership meeting. Mr. Bickle had no prior experience bargaining a collective agreement. He had no prior experience in the unionized sector of the construction industry. And if his testimony is to be believed, he has little understanding of the way in which bargaining has been conducted or the realities of the current bargaining environment.
- 109. It appears that the March 27 meeting was Simone's last official action before he and Mazzotta went over to the Labourers' union to assist Local 183's raid on Local 675.
- 110. Under the *Labour Relations Act*, employees are entitled to change unions (i.e. one union can displace another) during the last two months of a collective agreement. Since the carpenters' residential and ICI collective agreements both expired on April 1995, "the raiding period" was March and April 1995 and could be extended if there was no replacement agreement negotiated. The raiding period parallels the period for negotiating a new collective agreement.
- 111. As I have already mentioned Labourers' Local 183 has filed applications to displace Local 675 at nine drywall companies, including some of the largest ones. The labourers have mounted similar raids in respect of drywall tapers (represented by the painters' union). Local 183 is moving on a broad front to establish one dominant union in the drywall industry.
- 112. The Labourers' campaign requires Local 183 to persuade members of other unions to join 183. However there are also allegations that Local 183 elicited the support of the employers, who were supposedly told that it would be in their interest to deal with a single union with close connections to the builders. In all likelihood, the defection of Simone and Mazzotta will assist the Labourers' campaign.
- The Labourers' raid is not the focus of the present proceeding. But it is clear that Local 675 was under serious attack and that the raid would influence the course of bargaining. One result was a trusteeship over Local 675 that was imposed by the parent union on March 29, 1995, after it became clear that the senior officers of the local were plotting its destruction. More important for present purposes, was the effect on the bargaining. The ongoing bargaining with ISCA was already difficult. The contractors were demanding concessions in order to secure their access to work.

However the Labourers' raid added another dimension to the problem. A strike by Local 675 could now prompt builders to switch to *either* non-union contractors or Local 183 contractors, who could ensure that drywall work continued without interruption. Builders could have their work done "union" without having Local 675 on their job sites. Helmut Redermeier, a long-time Local 675 official, thought that a strike would "play into Simone's hands".

- Helmut Redermeier has been a business agent of Local 675 for 17 years, and has been hiring hall dispatcher from time to time. After the imposition of the trusteeship on March 29, 1995, Trustee Jim Smith appointed Redermeier as Acting Business Manager of the Local. It was what Redermeier's describes as a "friendly supervision". The parent union did not involve itself in the day to day affairs of the local. Redermeier was instructed to carry on "business as usual" although, as he understood it, the trusteeship suspended the regular functioning of the local union, so that he was no longer obliged to adhere strictly to the local by-laws.
- One of the functions that Redermeier assumed was the ongoing renegotiation of the ICI and residential agreements. That is a function that the business manager has under the local bylaws. Redermeier was assisted by Collin Weller, the secretary-treasurer of Local 675.
- Weller and Redermeier took over where Simone had left off. However, by late March 1995, the contractors' position had hardened. They were still prepared to consider adding stringent "policing language" to both the ICI and residential agreements. But in return, they wanted significant wage cuts, which extended into the Toronto area where the majority of Local 675 members work. The contractors maintained that the market situation was continuing to deteriorate and that their businesses were not competitive at the prevailing agreement rates.
- 117. On April 10, 1995 the members of ISCA had a meeting on short notice to consider the ramifications of the Labourers' raid, and the potential impact on their dealings with Local 675. Their discussion is accurately summarized in the minutes of the meeting:

The chairman opened the meeting by explaining that this meeting had been called on such short notice, due to all the rumours presently existing, due to the fact that the business manager and two business agents of Local 675 had moved to the Labourers Union, along with three business agents from Local 27. It was suggested that the Labourers Union planned a raid on the members of Local 675. The question was asked if any members knew of their employees being approached by the Labourers Union.

. . .

There followed a general discussion about the market conditions existing, most members were convinced that prices were getting worse in recent months, and non union competition increasing. The suggestion was made that it might be a good time for an approach to both unions Local 675 and 1891 for a roll back in wages for Toronto and surrounding areas.

Finally a motion was duly made seconded and carried unanimously that the Association inform both Local 675 and [painters'] 1891 that at the end of the current collective agreements we would be seeking a reduction of thirty per cent in all monetary wage items across the board for the Toronto area and vicinity.

There followed more discussion some members feeling that a thirty per cent reduction was not realistic, but generally it was concluded that this figure truly reflected the marketplace and was was happening out there.

The employer members of ISCA also considered the incidence of "cheating" to which I have already referred. They concluded that the existing policing language in the residential agree-

ment simply wasn't working. They voted to scrap it on ten days notice — as they were entitled to do.

- As of the end of April there was no policing language in place. But there was a willingness to have better language in both the residential and ICI agreements, if the union would agree to concessions.
- 120. Between April and mid-June Weller and Redermeier were the chief spokesmen for Local 675. The members of the committee struck by Simone on March 27 had no involvement.
- 121. There were bargaining meetings on April 13, May 27, June 5 and June 15. But there there no agreement. The employers were insisting on major wage concessions in return for a strict enforcement mechanism; and while Local 675 was anxious to obtain a policing language, it was not prepared to agree to a thirty per cent wage cut.
- Local 675 was also attempting to assess the threat from Local 183. The defection of Simone and Mazzotta was likely to facilitate Local 183's approach to both Local 675 members and Local 675 contractors. The nine certification applications suggested that Local 183 had "signed up" a number of Local 675 members. Local 675 urged its members to resist the promises of Local 183, which had made no secret of its intention to "take over" the drywall industry.
- 123. Mr. Bickle was not present for the bargaining sessions prior to June 21. Nor did he seek to attend despite his appointment to the "negotiating committee" some weeks earlier.
- 124. The EBA and the OPC were not involved in the bargaining even though the negotiations related to both the ICI and residential agreements. Throughout this period, Mr. Redermeier never said that he was representing or spoke for the OPC. However, he did say that he had the authority from Jim Smith to sign a deal on behalf of Local 675 covering both the ICI and residential sectors of the industry.
- 125. I should note that while Jim Smith was trustee over Local 675, he had no authority with respect to other Ontario Locals. Nor did the trusteeship or Mr. Smith's role as trustee have anything to do with the provincial bargaining agency. Mr. Smith does not speak for the OPC, and, in fact, played no role in the bargaining. Whether or not the International Union could tinker with the provincial bargaining scheme through the device of a "trusteeship", there is no evidence that it intended to do so.
- On June 21 and June 23, there were further negotiation meetings. The parties' positions were very much the same. This time, though, Mr. Bickle was in attendance.
- Mr. Bickle's presence did not contribute to either the tone or the progress of the bargaining. He insisted that he was only there to discuss the residential sector (which was where he worked) and he got into a shouting match with several of the contractors, who pointed out quite correctly that for the last five months the parties had been discussing a package deal in both ICI and residential. They did not welcome the presence of someone who seemed completely ill-informed, and had recently helped to organize the unlawful strikes.
- Mr. Bickle was unsympathetic to the employers' concerns about competition, the deteriorating market, the growing non-union threat, or the consequences of a possible strike. He thought this was just a bargaining tactic. He was either unaware or did not appreciate the significance of the "policing language" that had been under discussion for some time which is a bit surprising given Mr. Bickle's complaints about the number of outstanding grievances. The whole

purpose of the policing language was to ensure compliance with the agreement so that grievances would be unnecessary.

- Mr. Bickle's focus was the proposed wage rollback, which he maintained the members would never accept. By June 23, Mr. Bickle had reached the conclusion that a strike would be the best way to promote the members' interests. He admitted in the course of cross-examination that all he ever really wanted was a lawful strike. That was his objective.
- 130. In the course of the hearing, much was made about the employer's angry reaction to Mr. Bickle's presence at the bargaining table. However, I do not think that there was anything sinister about that. A hostile reaction was almost inevitable in the circumstances. Mr. Bickle had no knowledge of the unionized employers' situation or the economics of the unionized sector of the construction industry. He had worked non-union for twenty-two years. Had only been a union member for three months. He had virtually no experience in collective bargaining and no experience of construction industry bargaining. His manner was abrasive, and he seemed to be rejecting the framework for discussion that had been pursued by both parties for some time.
- 131. It is hardly surprising that the employers had an adverse reaction when Mr. Bickle was parachuted unexpectedly into the bargaining, dismissed their concerns out of hand, and rejected the basis on which negotiations had preceded for the previous five months.
- Mr. Bickle's presence at the bargaining table was not likely to lead to a accommodation. It was more likely to lead to a strike.
- 133. On the other hand, it must have been clear to the contractors that, if Mr. Bickle was representative of the rank and file membership, there was great resistance to any wage concessions.
- 134. Mr. Redermeier testified that that was one of the reasons why he had brought Mr. Bickle along. He wanted to expose some union members to "what he was up against". But, at the same, he also wanted to show the employers the difficulty that he was having restraining the rank and file membership or persuading them that concessions were necessary.
- 135. In the course of the discussions Mr. Redermeier advised the contractors that, as things then stood, if he put the proposed wage cuts before the membership for their acceptance, he would be "laughed out of the hall". Redermeier had little appetite for that despite the contractors' insistence that he take their proposals to the members, explain the situation, and see if the members would accept it.
- 136. As of June 23, 1995, there was no agreement for either the ICI amendments or the new residential agreement. If anything, the presence of Mr. Bickle made a settlement more remote than ever.
- 137. While collective bargaining was going on, the officials of Local 675 were consulting the membership, to advise them what was happening at the bargaining table and to discuss the impact of the Local 183 raids. There were local executive meetings on April 18, May 16 and June 20. There were general membership meetings on April 12, May 29 and June 26.
- Over the course of these meetings, there was considerable discussion about the tactics of Local 183, the threat of non-union competition, the deteriorating construction market, and the risk that a strike would prompt builders to direct work to non-union or "Local 183 companies". There was also a considerable discussion about the ongoing "cheating" by contractors and union

members alike. There were quite a number of grievances that would have to be taken as applications to the Ontario Labour Relations Board. Mr. Redermeier advised the members that they should insist on the contract rates, and retain the work records so that grievances could be pursued as necessary.

- 139. It was clear to Mr. Redermeier that quite a number of union members were willing to work below the contract rates, making it very hard for him to insist that those rates should be maintained despite the members' supposed resistance to wage concessions. At the May 29 meeting Mr. Redermeier conducted a poll to see how many workers were being paid the contract piecework rate. No one stood up. A few workers indicated that they were being paid 15% less. It appeared that others might be working for even less. Mr. Redermeier wondered how he could argue against concessions when the members were obviously willing to work for much less than the rates stipulated in the agreement.
- 140. Similarly, while members were openly expressly their support for Local 675, it was clear that a significant number of them had secretly signed on with the Labourers. From Redermeier's perspective, there was a big gap between what the members were saying, what they were doing, and what was realistically attainable at the bargaining table.
- At the union meeting of May 29, there was a heated discussion about the proposed roll-backs, the volume of grievances and the continuing erosion of collective agreement standards. Redermeier advised the members that the bargaining parties were still far apart. There had been no agreement to any concessions, and the next step was to seek conciliation, so that employees would be in a position to engage in a lawful strike (in residential only the ICI agreement was still in place so no ICI strike was possible).
- At the same time, Redermeier reiterated that there were serious problems in the industry, and he warned that a strike could prompt the builders to channel work to Local 183 in which case the members "could kiss the work and Local 675 goodbye". Redermeier also warned that Local 183 was pursuing direct agreements with builders that would channel work away from Local 675 contractors. A strike would merely encourage builders to enter into arrangements of that kind. If builders entered into a restrictive contracting arrangement with Local 183, Local 675 contractors would be excluded from the job sites.
- 143. These were not unreasonable fears. The Labourers have done such things before, and there may not be anything illegal about such tactics. However, as of May 29, the membership of Local 675 was left with the impression that:
 - (1) there was no agreement between the parties and no agreement likely in the near future;
 - (2) there would be further negotiations with the contractors and further consultations with the membership before any agreement was reached; and
 - (3) that the next steps involved an application for conciliation (to put the local in a lawful strike position), and a strike vote.
- On May 30 and June 1 there were widespread unlawful strikes in response to the contractors' proposed wage rollback. Redermeier feared that the unlawful work stoppages alone would prompt builders to re-direct the flow of work, or prompt Local 675 contractors to seek their own accommodations with Local 183. Redermeier also knew that Simone had long-standing per-

sonal relationships with the Local 675 contractors, which Redermeier expected would now be employed to encourage the contractors to favour Local 183. The unlawful strikes were not helping the situation. As Redermeier put it "my lips were brown trying to persuade contractors to stay with us".

- Redermeier promised the striking members that if they would go back to work, he would go on bargaining and seek a no-board report from the Minister of Labour (which must be obtained before a lawful strike can occur see section 74 of the Act).
- On June 26, 1995 there was another membership meeting which, by all accounts, was noisy and turbulent. The rollbacks that had been suggested by the contractors were raised once again, and rejected by the members with a resounding "no" from the floor. There was obvious frustration and a number of angry flare-ups.
- On June 26, Redermeier assured those present that there would be no settlement without first going back to the membership for their approval. He said he would try to have a conciliation officer available for the next round of bargaining, so that the statutory requirement for a strike would be met. He also told the members that Mr. Bickle would be there at the next meeting to the obvious approval of the members who gave a resounding cheer at the point. Redermeier indicated that there would be more membership meetings and that it would be necessary to arrange for a strike vote as soon as possible.
- 148. There was no indication that a settlement was imminent or that he was prepared to accept the wage concessions that had previously been rejected.
- I might pause at this point to observe that the *Labour Relations Act* does not require that there be a ratification vote before there can be a valid collective agreement. The Act merely says that if there is such vote, it must conducted by secret ballot on reasonable notice (see section 74). In the ICI sector there are some special voting procedures that must be followed before a new collective agreement can be approved or rejected (see section 152 of the Act). But those provisions have no application in this case, because what was in issue were amendments to the existing 1995-98 ICI agreement.
- Ratification votes are a common feature of the labour relations scene. But the statute does not expressly require them. In fact, in some circumstances, a trade union may be entitled to sign a collective agreement even though a majority of employees have rejected it (see the situation discussed by the Board in *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421).
- Nor was Local 675 required to take Mr. Bickle back to the bargaining table. Indeed there were good reasons why Mr. Bickle should not be there, given his inexperience and the problems that arose at the two meetings that he did attend. His selection in March was, to say the least, problematic. He had taken no part in the bargaining between March and the end of June. He had no bargaining experience to speak of, and he had only bee a member of the union for 3 months. For 22 years he had worked for the non-union competition. And his stubborn demand for a strike was not likely to prompt a settlement without one.
- Nevertheless, I am satisfied that by June 6, Mr. Redermeier had assured the members of Local 675 that: there would be no settlement without further consultation and ratification by them, that Mr. Bickle would be involved in the next bargaining session, that he would apply for conciliation, and that he would arrange for a strike vote.

- 153. At the end of the June 26th meeting told Bickle that he would be informed when the next bargaining session was scheduled. But Redermeier did not do that.
- 154. The next bargaining meeting took place two days later on Wednesday June 28, 1995. There was a further meeting the following day, June 29th. At those meetings, Redermeier, Weller and the representatives of ISCA concluded the "settlement" which is at issue in these proceedings.
- No one advised Bickle or the members of Local 675 that further meetings would take place that week. No one told the members that the local officials were suddenly prepared to sign a settlement that included significant wage concessions (thirty per cent) in return for strict policing language. There was no further consultation with the members at all, and no ratification vote. Nor did Redermeier and Weller seek the assistance of a conciliation officer or arrange for a strike vote as they had said they would.
- 156. On June 28th, Redermeier and Hugh Laird signed a document [Exhibit 11] entitled "Memorandum of Settlement ... between United Brotherhood of Carpenters and Joiners of America ... and ... Interior Systems Contractors Association ...". The settlement encompassed economic terms and working conditions, hours of work, the withdrawal of an outstanding unfair labour practice complaint, an arrangement for dealing with outstanding grievances, and a provision allowing employers to "name hire" workers in Local 675's jurisdiction (i.e. allowing the contractors to select the particular workers that they wished to employ).
- 157. The June 28th settlement is clearly intended to apply in both the ICI and the residential sectors of the construction industry. It contains this preamble:

"It is agreed by the parties hereto that the Collective Agreement between them in the Residential Sector of the Construction Industry expired April 30, 1995 and the Appendix for Local 675 in the ICI sector shall be amended as follows ..."

- 158. The settlement is made "subject to the parties finalizing all delinquency and collection items no later than July 7, 1995 effective July 15, 1995 the following rates shall apply ...". This was a reference to the "policing language" to which I have already referred, which had apparently been substantially settled by June 15, 1995. One of the problems with the "policing language" was its potential collision with the Board's approach to "penalty clauses" in collective agreements an approach which the negotiating parties were worried would undermine a sensible arrangement, necessary to preserve collective bargaining.
- 159. In the course of the discussions, in May or June Mr. Redermeier was asked whether he had authority to conclude a settlement without going back to the members or seeking further ratification. He indicated that he did. Mr. Redermeier testified that, as far as he was concerned, there was a "deal" on June 28. No ratification was necessary. Ratification was not an issue on June 28. The evidence is that when the settlement was signed the bargaining parties were elated and broke out a bottle of brandy to celebrate.
- 160. The next day, the parties met once again and concluded another (unsigned) document entitled "Memorandum of Agreement". It too is between "United Brotherhood of Carpenters and Joiners of America Local 675 (the union) ... and ... Interior Systems Contractors Association of Ontario (ISCA)". The June 29 agreement expands the one from the day before, and begins with this preamble:

"It is agreed by the parties hereto that the Collective Agreement between them in the Residential Sector of the Construction Industry expired April 30, 1995, and subject to the Agreement

Acoustical Association of Ontario, the Appendix for Local 675 in the ICI sector provincial agreement shall be amended as follows ..."

It is not subject to ratification or review by anyone else.

- The June 29 document, although unsigned, contains a number of further changes to wages and working conditions in the ICI and residential sectors, including the establishment of a "joint labour management clause". I am told, that this is a reference to the "policing language" that the parties had substantially agreed to a couple of weeks before. The document notes that a four-page attachment representing their understanding of the "policing language" is to be considered part of the memorandum.
- The parties were in a hurry to deliver this document to Mr. Smith, Trustee of local 675, who was leaving for Ireland the following day. The parties wanted to obtain Mr. Smith's signature before he departed. Mr. Smith did not sign the document.
- 163. I am satisfied that as of Friday, June 30, 1995, all of the persons at the bargaining table (Laird, McKean and Liberman for the Contractors; Redermeier and Weller for Local 675) thought that they had a full and final settlement applicable in the ICI sector for Local 675's jurisdictional area, and applicable in the residential sector province-wide.

The Events Between June 4 and July 12, 1995

- Rick LeCompte is the Secretary-Treasurer of the Carpenters Bargaining Conference ("CBC"), the division of the OPC that is directly concerned with the contents of the Provincial Agreement. LeCompte confirmed the outline of the Port Severn Accord, but also confirmed that its ratification had been quite difficult. He pointed out that half of the Local Unions had been opposed to it including Local 675.
- 165. Some of the Locals were unenthusiastic about the Port Severn Accord because it was, essentially, a continuation of the status quo for an additional three years. There were a number of outstanding bargaining issues, and it was not at all clear that voluntary discussion or the limited arbitration arrangements would resolve them.
- Among the other irritants in 1994, was what the parties described as the "mobility problem": the extent to which contractors could bring their own workers with them when they worked on jobs outside their usual geographic market. If employers from outside a local area could bring in their own workers, there would be less work for local members in their home area. If companies were mobile, it was important that locally negotiated wage schedules be congruent, or the contractors would play one local off against the other. Port Severn did not resolve that concern.
- 167. LeCompte testified that he knew that there were ongoing negotiations between ISCA and Local 675. That was contemplated by the Port Severn Agreement, and was confirmed by some discussions he had with Gus Simone in early 1995. However, LeCompte did not know what the parties were negotiating about, nor their intention to seek what might be regarded as very significant changes to the ICI Agreement in the Toronto area.
- As I have already noted, Local 675 has never been authorized to speak on behalf of the OPC, and Redermeier was never told that he could do that. Nor did Redermeier ever tell ISCA representatives that he could speak on behalf of or bind the OPC (although that seems to have been ISCA's assumption). LeCompte testified that between February and June he had no conversations with Local 675 canvassing the ongoing local discussions.

- 169. LeCompte learned of the proposed settlement late on Friday, June 30 that is, just before the Canada Day long weekend. Between June 30 and July 4 he had some difficulty contacting representatives of the CBC/OPC. Those members that he contacted were not enthusiastic about the proposed deal.
- One member of the OPC suggested that a significant wage cut for Local 675 might aggravate the "mobility problem", and that if the ISCA proposals were to be acceptable, there would have to be some additional language to address that question. Whether this was genuine concern about mobility or a desire to exchange the OPC's agreement for further concessions, I need not decide. It suffices to say that, at that point, the OPC was not prepared to "rubber stamp" the agreement struck between ISCA and Local 675.
- 171. On July 4 and July 5 LeCompte (on behalf of the CBC/OPC) confirmed that the OPC was rejecting the proposed amendments, insofar as they affected the ICI sector. The OPC's reasons are not set out in LeCompte's communications and were initially said to involve the *procedures* adopted, and the way in which the documents purported to affect the ICI and residential sectors.
- 172. I am satisfied that LeCompte was dissembling at this stage. Later, though, the OPC amplified its concerns, including: the size of the wage cuts; the form of the name hiring proposal which the parties intended to insert into the ICI Agreement; the form of the policing language; the potential impact on the mobility issue; and, perhaps most important, the fact that the memorandum had not been ratified by the membership.
- 173. There is nothing obviously unreasonable about any of these concerns even though they were not articulated immediately. And by July 6, LeCompte would have been well aware that Local 675 was facing a membership revolt. There had already been unlawful strikes about the "possibility" of concessions, yet the settlement made them a reality and without even a vote of the members. That was hardly likely to strengthen a union already under assault from Local 183.
- 174. Article 28 has been in the Collective Agreement for many years. But there are no established procedures for securing agreement under Article 28. Nor has the practice been uniform.
- 175. On August 31, 1994 Local 1946 (London) negotiated a settlement with the London and District Construction Association. That settlement was to amend quite a number of terms of the Local Schedule for London in the Provincial Collective Agreement. I am told that the settlement involved a significant wage cut.
- 176. The Employers' Provincial Bargaining Agency approved the London memorandum by signing it on or about September 15, 1994. However the OPC refused to approve the memorandum, and issued a notice to that effect dated September 12, 1994. The OPC gave no reasons for its objection or for its refusal to give its written agreement.
- 177. Thereafter, there were further efforts to resurrect the deal. But when those failed, the memorandum lapsed. No one suggested that the OPC was *required* to "rubber stamp" the local settlement, even though the local bargaining parties were in agreement with it.
- 178. On the other hand, under Article 28, the OPC has also approved quite a number of changes that were negotiated locally including changes that involved significant wage cuts. The Kingston Local negotiated a 15 per cent wage cut, that was later approved by the OPC. Local 1316 a London Drywall Local negotiated an \$8.00 reduction which was likewise approved by the

OPC. In both cases, the Local bargaining parties concluded that the Local construction market was weak, and a reduction in wages was necessary in order to meet non-union competition.

- 179. LeCompte described Article 28 as a "hardship" or an "enabling clause", that permitted wage adjustments so that union members would continue to get work. Wage adjustments for that purpose had been granted on a number of occasions. However, LeCompte testified that he was unaware of any major concessions that had not been ratified by the union members affected.
- 180. On the evening of Wednesday, July 5, ISCA held a meeting of its contractor members. The purpose of the meeting was to discuss the memorandum of settlement that had been concluded the previous Friday. The minutes of that meeting read, in part, as follows:

The memorandum with local 675 was distributed to the members present. Joe Liberman explained that in return for the union lowing wage rates by some thirty per cent we had to give the union language which would allow them to seriously penalize any contractors who did not abide by the collective agreement. Joe Liberman gave the members present an explanation of the penalties involved. There followed a general discussion about the memorandum, the chairman informed the meeting about the many meetings which had taken place with the union, and he thought that the memorandum was the best possible deal we could get.

Finally a motion was duly made seconded and carried unanimously that the memorandum dated 28 June 1995 be ratified.

Joe Liberman asked the membership about our position if the memorandum was challenged and turned down in the ICI sector. It was the consensus of the meeting that our position had always been that our offer applied to both residential and ICI sectors, and if it was challenged and turned down in one sector, then we did not have a deal.

(emphasis added)

- 181. On July 6, LeCompte came to Toronto to attend a meeting with ISCA scheduled for that evening. Earlier on that day, he met a large number of angry union members who were milling around the union hall. In the circumstances, he could not have been in any doubt that the proposed settlement was a "problem".
- On July 6, LeCompte and other representatives of the union met with representatives of ISCA to see if there was some way to resolve the controversy. LeCompte suggested that the parties needed a few weeks to consider their positions. He suggested that the parties had to be "more creative", that they had to make the [wage cuts] more palatable, that they needed "time to reflect", and that the package had to be refashioned so that the union could "sell it" to its members. By this time, of course, the union was clearly concerned about the level of employee unrest, which had already blossomed into unlawful strikes and threatened to fuel the Local 183 raid.
- 183. In accordance with the decision of its members the night before, ISCA maintained that there was one package deal for both ICI and residential. ISCA was unwilling to discuss residential alone or to back down on across-the-board cuts in both sectors. The union representatives replied that, in that case, there was "no deal".
- 184. The parties agreed to come back for further discussions in about a week. But as contractor Sgotto put it, "if you come back asking for more money ... forget it".
- 185. The parties met again on July 12. The union had further proposals which, it said, might be more palatable and appropriate. But the ISCA representatives again refused to negotiate, maintaining that they already had a deal for *both* sectors. On July 12, ISCA's position once more was that it was "all or nothing". ISCA was not prepared to negotiate changes to the agreed-upon

memorandum, nor separate provisions for ICI and residential. As before, the union replied that, in that case, there was no agreement.

- 186. On July 12, Jim Thomson, on behalf of the EBA wrote to the OPC requesting its formal agreement under Article 28 of the Collective Agreement. The OPC continued to refuse. ISCA and the EBA commenced these proceedings on July 14.
- 187. The EBA claims under section 126 of the Act that the OPC is required to execute the agreement that was agreed to at the Local level, and that from July 15 onwards the ICI terms prevailing in Toronto are those settled on June 28-29. On the section 91 branch of the claim, ISCA contends that Local 675 is bargaining in bad faith when it refuses to sign a residential agreement based on the June 28-29 settlement. ISCA argues, in the alternative, that there is at least an agreement in the residential sector.
- I might note, in passing, that in their arguments before the Board the parties are taking different positions than they took in bargaining up to and including July 12. Until July 12 the employers were maintaining that they had an "all or nothing" deal, that applied to both ICI and residential. The union said that there was no deal at all in the ICI, but there might be a binding residential agreement.
- 189. Before the Board, however, ISCA argued, in the alternative, that it had an agreement in a residential sector even if there was no agreement in the ICI sector. The unions argued that because the bargaining was intertwined, there is no deal at all in either sector.

DECISION

Has there been a valid amendment to the ICI agreement?

- 190. On this branch of the case, I must decide whether the OPC was in breach of the ICI agreement, when it refused to extend the "written agreement" contemplated by Article 28. In the contractors' submission, the OPC should either be *deemed* to have given its consent to the proposed ICI amendments, or the Board should direct the OPC to give the "written agreement" required by Article 28. The contractors maintain that, in all the circumstances, the OPC is not entitled to withhold its agreement.
- 191. I do not think that any of those propositions are sustainable, having regard to the statutory scheme, the collective bargaining background, and the language of Article 28 itself.
- 192. I find first of all that Mr. Redermeier was not authorized to speak for or bind the provincial bargaining agency the OPC. He was not an officer of the OPC, he was not the agent of the OPC, and no one from the OPC suggested that Redermeier was its spokesman. Nor could that be reasonably inferred from Redermeier's temporary appointment as business manager of Local 675.
- 193. No doubt Mr. Redermeier was entitled to involve himself in the residential negotiations in which Local 675 was engaged, and those negotiations could encompass parallel ICI changes. That is the way things seem to have been done in the past. But the OPC never gave Redermeier advance authorization for absolutely anything Local 675 might be disposed to agree to, nor did Mr. Redermeier say that he had such authority, nor did the OPC ever suggest to the EBA that Mr. Redermeier had "carte blanche" in the ICI sector, or that the OPC would "rubber stamp" any ICI changes agreed to locally.
- 194. It is understandable that the ISCA representatives thought that the OPC would go along

with any deal that was negotiated locally. That is the way the employer organization itself operates, and Mr. Redermeier probably did say that he expected the OPC to approve the settlement. After all, local negotiations were contemplated by the Port Severn Agreement, and for the drywall industry, the ICI and residential agreements had always been negotiated together in order to maintain comparable wage rates regardless of sector. That had been the past practice, and there was no reason for the employers to expect that it would not continue. Redermeier had the authority to settle the residential rates, and there was every reason to expect that the residential and ICI rates would move together as they had done in past.

- But more than that, the settlement was a reasonable one at least from the contractor's perspective and it was developed within the framework (wage concessions for policing language) that had been under discussion for some months. There were concessions on both sides, that the negotiators honestly considered necessary to meet the competition and stabilize the unionized part of the drywall industry.
- 196. Mr. Redermeier thought that the wage concessions were unpalatable but were necessary and realistic given the current market situation; moreover the policy language was an essential tool that would be added to ICI agreement for the first time. The policing language would compel contractors to adhere to the agreement, and stem the tide of grievances. From Redermeier's perspective, it was a sensible trade-off.
- 197. There might be disagreement about that assessment. But it is certainly a plausible one. And it is one that the contractors thought the OPC would also accept.
- 198. I am satisfied therefore that the employers honestly and reasonably believed that the OPC would be amenable to the proposed package. But the contractors' belief does not make it so. Nor is it easy to transform their expectations however reasonable into a binding *obligation* on the OPC's part.
- 199. As I have already noted, the legislation gives the provincial bargaining agencies a unique and exclusive status with respect to ICI bargaining. It makes local bargaining unlawful, and local arrangements "null and void" unless the provincial bargaining agencies actually agree to them. (See section 148 of the Act, and the discussion in, for example, *Sikora Mechanical Ltd.*, [1982] OLRB Rep. June 941). In that context, there is little room for notions like "holding out" or "ostensible authority" drawn from common or commercial law particularly when the "holding out", if any, is done by a local group.
- 200. It is evident that for ICI construction, the legislature has created a complex regulatory framework that has little in common with "ordinary" collective bargaining in industrial situations, let alone common or commercial law contract formation. Within that framework the provincial bargaining agencies have a pivotal and exclusive role which cannot be usurped by local bargaining groups. Against that background, its seems to me that for local bargaining to result in changes to the ICI agreement, the bargainers must have the actual authority of the provincial bargaining agencies, or obtain their consent after the fact, or, alternatively at the very least, the provincial bargaining agencies must have clearly indicated in advance that they were prepared to abandon their statutory veto and be bound by the results of whatever might be bargained locally. I do not think that one should readily infer that a local group speaks for the provincial bargaining agency, or that the endorsement of the provincial bargaining agency is routine or automatic. To do so would undermine its exclusive status in the statutory scheme.
- 201. In any event, the language of Article 28 is both completely consistent with the statutory scheme and provides a complete answer to the problem arising in this case: it preserves the exclu-

sive authority of the provincial bargaining agencies to agree to ICI amendments, or not, in accordance with their own assessment of the desirability of such changes. Indeed, Article 28 makes it clear that the consent of the bargaining agencies is not something that should be inferred. Article 28.01 and article 28.01 both require the "written agreement" of the provincial bargaining agencies.

- 202. There is no written agreement from the OPC in this case.
- 203. The employers argue that although Article 28 does not expressly say so, there is an *implied undertaking* that written agreement will not be "unreasonably withheld". The employers invoke what they describe as the "doctrine of reasonable contract interpretation" or, as they put it, the "implied obligation to act reasonably". The contractors rely upon cases such as: *International Nickel Company and USWA Local 6500* (1977) 14 L.A.C. 2d 13; *Council of Printing Industries of Canada* 83 CLLC ¶14,050 (C.A.); and the obiter comments of the Court in *Re CUPE Local 43 and Municipality of Metropolitan Toronto* (1990) 74 O.R. 2d 239).
- 204. The contractors acknowledge that the OPC has a *discretion* under Article 28. But the contractors maintain that the OPC must exercise that discretion in a manner that is neither "arbitrary, discriminatory, or in bad faith". The contractors assert that the OPC has not met that standard.
- 205. The employers maintain that there is no reasonable basis for the OPC to reject a sensible settlement. Indeed, the employers say that the OPC has routinely endorsed changes under Article 28, and has even agreed to significant wage concessions for example for Kingston Local 649 and for London Drywall Local 1316. There is nothing extraordinary about the June 28-29 settlement.
- 206. In the employers' submission, there was no reasonable basis for the OPC to reject the proposed ICI changes. The OPC's behaviour was arbitrary, in bad faith, and contrary to the purpose of Article 28 which the employers say was to facilitate economic adjustments to a changing market-place. In their submission, Mr. LeCompte's protests about the "form" of the settlement documents were a complete sham, because the OPC refused to endorse the changes even when they were put in the form that the OPC requested. In the employers' submission, Mr. LeCompte was acting in bad faith.
- 207. There are a number of difficulties with the employer's proposition even assuming, as I do, that Mr. LeCompte was not totally candid with the employers when he responded to their request for the OPC's agreement to the proposed amendments.
- 208. In the first place, the "implied duty of reasonableness" remains somewhat controversial. Many arbitrators remain reluctant to imply material, yet unwritten terms, when a collective only exists only by a reason of the statute, and the statute itself requires that a collective agreement be "in writing". That is particularly so when most collective agreements have language similar to Article 23.07 of the ICI agreement. Article 23.07 reads:
 - "An arbitration board shall have no power to add to or subtract from or modify any of the terms of this agreement nor shall it give any decision inconsistent with the terms and provisions of this agreement."
- 209. In the face of language such as that, and in the circumstances of this case, it is not easy to "imply" words that are not there particularly since the agreement was negotiated by sophisticated parties who are quite capable writing up the terms of their bargain. If the parties had intended to say "such agreement shall not be unreasonably refused", they could easily have done so. But they did not.

- An implied obligation to agree to reasonable amendments seems quite inconsistent with the thrust of article 23.07; and it is difficult to accept that the parties had some shared understanding that each would have to agree to what an outside arbitrator judges to be reasonable.
- In any event, "the duty to act reasonably" has seldom been asserted as an unwritten, independent, and free-standing obligation, qualifying the terms to which the bargaining parties have expressly agreed. Usually, it is only an interpretive device, used to resolve an apparent clash of rights found in different sections of the agreement. Reasonableness can be gleaned from the contractual context: arbitrators assume that the parties could not have intended that one negotiated right would gobble up another, or that the existence of a discretion in one part of the agreement meant that it could be exercised in a manner entirely unrelated to the purpose for which it was granted or to subvert the purpose of some other clause.
- The "implied duty to be reasonable" cases, almost all involve the interpretation of existing clauses in a collective agreement, which may sometimes clash or point in different directions. None of the cases that I was referred to, involved adding new language to or amending a collective agreement. Certainly none of the cases that I was referred to suggest that a party is obliged to amend the collective agreement in a particular way just because it might be reasonable to do so (leaving aside the fact that what might seem reasonable to one party might not seem reasonable to someone else, or might involve a concession from which the other party might want something in return). And none of the cases involved requirements such as those found in section 148 of the Labour Relations Act, which makes Local bargaining illegal without the consent of the provincial agency. Article 28 describes a context that is more like bargaining than the administration of a settled collective agreement.
- 213. It is one thing to "imply" an obligation to be "reasonable" when, say, an employer is exercising a discretion to classify employees (the issue in *Council of Printing Industries*). It is quite another to "imply" an obligation to be reasonable in agreeing to local bargaining which is prohibited by law and would therefore be illegal without such agreement.
- I do not think that Article 28 imposes any obligation on provincial bargaining agencies to agree to "reasonable", changes to the collective agreement or, in this sense, to act "reasonably" in deciding whether to amend the agreement, or endorse an amendment proposed by others. Nor does an arbitrator have any authority to compel a provincial bargaining agency to agree to something that the arbitrator thinks is "reasonable" and "should" be agreed to. However, in deference to the argument made by counsel (and mindful that the parties will have to reopen discussions), I think I should say something about the "reasons" advanced by the union for refusing to endorse the June settlement. Are they really so "unreasonable" as the employers maintain, or so indicative of "bad faith"?
- To answer that question, I think that one has to remember that a trade union is not just a vehicle to negotiate workers' wages, responding to the dictates of an impersonal market-place. A trade union is also a political organization which must, to some extent, reflect sectional interests, local expectations, and pressures from its employee members. A trade union may not operate strictly by the balance sheet, and may not be able to respond solely or immediately to the economic needs of the employers with whom it negotiates even when a positive response seems to be called for (as it seems to be in this case).
- A trade union operates in the market-place and must, in the long run, take economic realities into account. But, unlike a business, a trade union is not driven solely by economics.
- 217. It seems to me, therefore, that even if there is some implied legal obligation to act rea-

sonably (which I do not think there is under Article 28), in the negotiating context envisaged by Article 28 the union is entitled to take into account its own agenda, just as the employers are entitled to pursue theirs. Indeed, counsel for the EBA conceded that in applying Article 28, there is more to the EBA's "review" than a simple comparison of the master language and local proposals to ensure that there was no conflict in the wording. The provincial EBA, has broader economic and collective bargaining interests that have to be considered - even though, as in this case, the EBA is prepared to defer to its local constituency.

- 218. Mr. LeCompte might have served the OPC better by being more candid with ISCA and the EBA about his reasons for questioning the proposed ICI amendments. But that does not mean that his reasons for rejecting them were illegitimate or unreasonable; moreover I think that those reasons (the "real reasons") can be ascertained from both his testimony and the general situation in which the OPC found itself.
- 219. On its face, the Port Severn Agreement does not contemplate significant wage cuts, nor is the arbitrator entitled to impose any even if the contract reopener portion of the agreement is triggered. On its face, the Port Severn Agreement maintains the status quo, authorizes further discussions, and limits the number of things that can be changed. No employee reading that document would expect that it would result in massive wage rollbacks. And it must be remembered that the Port Severn Agreement was only ratified with considerable difficulty. It was opposed by half the local unions in Ontario, including Local 675.
- 220. It is true that wage cuts are a possible consequence of local negotiations undertaken under the Port Severn Agreement, or that wage cuts could flow from the application of Article 28, which was not changed by the Port Severn Agreement. It is also true that the OPC has sometimes authorized wage concessions where it seemed sensible to do so to protect work opportunities, and where the employees had ratified the proposed rollbacks. However that does not mean that the OPC is *obliged* to sanction significant wage cuts for Local 675 particularly over the objection of the members of that Local. Nor does it mean that the OPC's reservations in that regard are "unreasonable", or "arbitrary" or a sign of "bad faith". It is a very large leap from "bad judgement" (from the contractors' point of view) to "bad faith".
- 221. From the OPC's perspective, the deal posed a number of problems.
- 222. There were significant wage cuts which seemed inconsistent with the spirit of the Port Severn arrangement and which, if given in Toronto, might prompt a demand for across-the-board cuts elsewhere in the province (employer counsel suggested that this was the "real reason" for the OPC's reluctance). There had been no ratification by the Local 675 employees concerned, and, more to the point, those employees were in open revolt, having already engaged in unlawful strikes to oppose the very cuts that the OPC was being asked to endorse. There was a concern (although not perhaps a serious one) about the "mobility" issue and the name hire aspects of the deal. And, of course, the proposed wage rollback and resulting employee opposition were occurring at the same time that the Labourers' Union was trying to persuade the employees that their interests would be better served by joining Local 183.
- 223. It seems to that these were reasonable considerations for the OPC to take into account, and that by mid-July, the OPC had either articulated those reasons or the EBA had deduced what they were. Litigation is not the best forum for communication, but the legal challenge did prompt the OPC to elaborate why it was troubled by the proposed wage cuts.
- Accordingly, even if there were some implied obligation under Article 28 to "act reasonably" (which, I repeat, I do not think there is), I would find that the OPC has met that obliga-

tion. It is not required to agree to an amendment just because the local bargainers have done so or the EBA demands it - even if the proposed amendments seem "reasonable" from the EBA's or an outsider's objective point of view. Nor has an arbitrator any role in this exercise.

- I conclude therefore that there was no breach of Article 28 of the collective agreement by the OPC, nor is there an obligation in this case to give the "written agreement" required by Article 28 before locally negotiated amendments can become effective.
- There is, therefore, no valid ICI amendment either rolling back wages or introducing policing language, or implementing any other parts of the "settlement" negotiated on June 28-29.
- 227. Insofar as the June 28-29 settlement purported to deal with ICI items, it is of no force and effect.
- I want to make it clear that in finding that there was no valid ICI amendment, I do not wish to be taken as suggesting that the amendments themselves are unreasonable, or that, from an economic point of view, they do not make sense. The evidence suggests that the proposed concessions and trade offs may well be sensible, and may well be necessary if Local 675 contractors are to withstand the threat of union and non-union competitors. Such changes may even be necessary for the long-term health of Local 675. But those are judgements that the OPC must make, in consultation with Local 675. I do not think that it is obliged to agree to the proposed settlement or that the OPC's agreement can be deemed or compelled by an arbitrator.
- 229. The OPC has not given its written agreement to the proposed changes, nor am I persuaded that the terms of the agreement require it to do so. Those amendments are, therefore, of no effect.

Is there a binding collective agreement in the residential sector?

- 230. If the ICI amendments are ineffective because the OPC did not approve them, is there nevertheless a binding provincial agreement in the residential sector? Or, to put the matter in the framework of the employers' section 91 complaint: are the parties in complete agreement and has a residential deal been completely finalized, so that neither party could now resile from it without breaching the section 15 duty to bargain in good faith? In particular, should the Board apply section 15 of the Act, find a breach by Local 675, and direct that Local 675 execute an agreement encompassing those portions of the June 28-29 settlement applicable in the residential sector?
- 231. In considering this situation, I think that it is important to take into account both the formal requirements necessary to constitute a collective agreement, and the collective bargaining realities of the situation including the parties' shared intentions and expectations. And, from that perspective, it is abundantly clear that no one ever thought that six months of bargaining for interrelated amendments in ICI and residential would result in a residential agreement only.
- I do not think that there is any doubt about Mr. Redermeier's authority to negotiate a residential agreement on behalf of Local 675, or to sign the settlement reached on June 28 (although Redermeier wrote on the document that he was signing on behalf of the Trustee, Jim Smith). Mr. Redermeier had the ostensible authority to act on behalf of the Trustee, and, as business manager of Local 675 (albeit in an acting capacity) he had the authority pursuant to both the Local By-laws and established practice to engage in collective bargaining. In fact, except for the objecting employees, no one seriously argues that Mr. Redermeier did not have that authority. As late as July 5, the union's staff lawyer was acknowledging that the agreement could be binding in residential, even if the ICI amendments failed; moreover, if the Trustee intended to repudiate Mr.

Redermeier's authority to sign the June 28 document, one would have expected him to give evidence to that effect. But he did not.

- The objecting employees claim that Mr. Redermeier did not have authority because at a June 26 union meeting; employees had rejected concessions, or because Mr. Bickle was not present for the settlement discussions, or because the trusteeship was invalid in some way. However I do not accept those submissions, some of which are dealt with in more detail below. Mr. Redermeier's behaviour may have triggered a breach of section 69 of the Act. But that does not mean that he did not have the authority to negotiate a residential agreement on behalf of Local 675.
- Nor am I persuaded that the employers were somehow complicit in a violation of section 69, or should have known that Redermeier was acting contrary to the wishes of some employees, or was wilfully blind to a potential "defect" when Redermeier was prepared to sign an agreement that was not expressly subject to employee ratification.
- Employee ratification is not required by the Labour Relations Act, or by the union constitution; and Mr. Redermeier did not say or suggest that a settlement would have to be subject to ratification by the membership. At the meeting of Friday, June 23, the contractors had urged Mr. Redermeier to take their proposal back to the membership, to explain it, and to see if the members would accept it. The contractors knew that there was a membership meeting scheduled for the following Monday. When Mr. Redermeier returned to the bargaining table on Wednesday and seemed amenable to agreement, there was no reason for the contractors to question him any further than they did.
- 236. Mr. Redermeier had already indicated on several occasions that he had the authority to sign an agreement and did not have seek membership ratification (because he and the employers both then believed that the trusteeship suspended established procedures). On June 28, employee ratification was simply not an issue. Mr. Redermeier also thought that OPC approval would be virtually automatic.
- 237. The June 29 portion of the settlement is more problematic, because no one from the trade union has ever signed that document, even though it was obviously an integral part of the deal extending and elaborating upon the terms of settlement, and incorporating the "policing language" which, the day before, had been made subject to review and clarification by the union's staff lawyer. At that point, the contractors must have recognized that even Mr. Redermeier was having doubts about his authority, since he was not prepared to "sign off" on his own, and the parties had to scramble to get the documents over to Mr. Smith for his approval, prior to Mr. Smith's departure for Ireland.
- 238. But Mr. Smith never did approve or sign the document of June 29. Neither did anyone else on behalf of Local 675.
- Nor do I think that the review by the union's staff lawyer was quite so routine or "proforma" as counsel for the contractors suggests.
- 240. The policing language was a critical feature of the bargain. It was the trade off for the wage concessions, and had, in fact, been fiercely resisted by the AAO in the early rounds of bargaining. Without the policing language there could be no settlement from the union's point of view.
- On May 27, when the outlines of the deal were beginning to take shape, the contractors'

representatives pointed out that the Ontario Labour Relations Board "might not accept" or enforce the "penalties" contemplated by the policing mechanism, even if the parties agreed they were necessary to maintain the integrity of the collective agreement. (Some recent OLRB decisions suggest that the Board may not give effect to "penalty clauses" even though they have been negotiated by sophisticated provincial bargaining agencies as part of the provincial collective agreement and have institutional purposes, wholly unrelated to a nineteenth century common law context where "penalty clauses" were frowned upon). In the circumstances, it is not surprising that Mr. Redermeier wanted his lawyer to review those proposals, and there is no dispute that such review never took place.

- 242. But there is a more fundamental reason for concluding that there is no residential agreement.
- 243. I find that even if the formal requirements for a collective agreement have been met, the focus of the bargaining has always been a single package of changes for both the ICI and residential sectors. There has never been any common intention to have a "stand alone" residential agreement, either on June 28-29 or in the two meetings held later, when the proposed settlement seemed to be coming apart.
- 244. It might have been possible to retrieve the residential portion of the settlement, if the parties (but especially the contractors) had been willing to reject the linkage with ICI, to divide up the settlement, to separate out the items pertaining to the residential sector, and to embody those items in a stand alone collective agreement. As late as July 6, there was some willingness on the part of Local 675 to do that, and they approached the contractors with that objective in mind.
- But the employers were unresponsive. They took the position that they already had a package deal, that it applied in both ICI and residential, and that they were not going to contemplate an independent residential collective agreement. Nor was this position surprising or at all unreasonable given the history of these negotiations, or, the way that negotiations had been conducted in past years. There were valid business reasons for wanting congruent terms in the ICI and residential agreements. There were valid business reasons why differential wage rates made little sense. It is entirely understandable that the contractors would say, in effect, there must be one deal for both sectors or there can be no deal at all.
- The contractors' alternative legal position *in this proceeding*, is that if the proposed ICI amendments are inoperative, there is nevertheless a binding agreement in the residential sector. However, I find that there was never any common or shared intention to enter into a separate, "stand alone" residential agreement, consisting of the residential changes settled on June 28-29.
- I conclude, therefore, that there is no subsisting residential drywall agreement and that Local 675 has no obligation under section 15 of the Act to execute an agreement along those lines in accordance with the residential items (only) of the June 29-30 "settlement".
- I am not particularly sanguine about this result, which will have the effect of sending the parties back to the bargaining table at a particularly difficult time. Moreover, there is a very good argument that the June 28-29 *is* a reasonable comprise, given the unsettled state of the construction industry. But I cannot conclude that such settlement was ever intended to produce a "stand alone" residential agreement.
- One of the casualties of this case may be the good relationship that the union and the employers have had, since the negotiation of the Port Severn Accord in 1994. However, having considered the evidence the parties' representations, I conclude that there has been no valid and

binding amendments to the ICI collective agreement and there has been no effective renewal of the residential agreement. If the parties wish to accomplish those objectives, they must return to the bargaining table.

Did Local 675 breach its duty of fair representation?

- 250. Section 69 of the *Labour Relations Act* reads as follows:
 - **69.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.
- 251. There is no real dispute that the duty of fair representation owed to employees is just as relevant to the negotiation of a collective agreement as it is during the operation of such agreement. But the context is quite different, and that must be taken into account when the union's conduct is being assessed. In *Ford Motor Company v. Huffman*, [1953] 345 U.S. 330, the United States Supreme Court put it this way:

"The bargaining representative, whoever it may be, is responsible to and owes complete loyalty to, the interests of all whom it represents. ... Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in exercise of its discretion."

- Collective bargaining is not like adjudicating a legal dispute or even weighing competing interpretations of a contract. It is a tactical and strategic exercise, where politics and pressure are intertwined, and the resort to economic sanctions (a strike or lock-out) is much more overt and abrupt than in most business dealings. In order to bargain effectively, a union has to nurture employee grievances and solidarity, just in case a strike becomes necessary. The union has to "talk tough" and encourage enthusiasm for a "fight". Yet at the same time, the union must contain employee militancy that is getting out of hand or unlikely to achieve concrete gains.
- 253. In achieving a settlement without a strike, some employee disappointment may be almost inevitable. A compromise often requires that something be given up in exchange for what is gained. Moreover, a union is obliged to promote the employees' *interests* not just cater to their expectations, as the Board observed in *Diamond Z Association*, [1975] OLRB Rep. Oct. 791:
 - "Achieving this mutual accommodation [a settlement] requires the unfettered discretion of the representatives of the parties to explore all avenues of accommodation without the intervention of this Board in setting standards of conduct that may be characterized as an unwarranted intrusion in their private affairs. We are of the view that the representative trade union despite its obligation to employees in complying with the duty of fair representation, must necessarily have a "free hand" in setting strategies that will best forward employees' interests, irrespective of their expectations".

The Board has usually resisted the temptation to second guess the union's tactics, or to impose the Board's own notions of what a "fair" settlement might look like.

The union's task is particularly difficult when the employees have unrealistic expectations or do not fully appreciate the economic realities of the market-place or, as here, seem prepared to disregard the law. What seems "fair" to employees is not always reasonably attainable. Yet a responsible trade union will not lightly drag its members into a strike unless there is a reason-

able prospect of achieving some concrete advantage. The union must weigh the utility of strike even when the alternative is an agreement that employees may find unsatisfactory.

- Section 69 does not require trade unions to consult their members at every step of the bargaining process, nor, generally speaking, does it dictate that their consultations will occur at any particular stage or in any particular form. There must be some form of consultation at some stage, (Manor Cleaners Ltd., [1983] OLRB Rep. June 929; Cuddy Food Products Ltd., [1988] Rep. Dec. 1211), but beyond that, the union is largely left to conduct bargaining in accordance with its own procedures and tactical judgement.
- The statute does not require that there be a strike or ratification vote although many unions conduct such referenda and the union is not necessarily obliged to call a strike simply because the employee support one, or to reject an agreement merely because employees have done so. (See *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421). A union is entitled a fairly wide latitude. The ultimate remedy for disgruntled employees is not litigation, but the rejection of the union altogether or its replacement by a rival organization. If a majority remains dissatisfied, it can oust the union at the appropriate time. The employees' ultimate remedy is at the ballot box.
- 257. That said, all of the cases presume that the union will be acting in good faith in its dealings with employees even when those employees are dissatisfied, or are themselves acting unreasonably, or they do not appreciate the reasons for the union's decision. Thus, in *Ford Motor Company*, above, the Court made its concession to union flexibility expressly conditional upon "complete good faith and honesty of purpose". In *Diamond Z Association*, above, the Board said:

"... An employee is entitled to be represented by his trade union with candour and with honesty in connection with the disposition of his concerns. A trade union that declines upon proof thereof to satisfy these simply employee expectations will be liable to pay the penalties contemplated by remedial provision of the *Labour Relations*

Act. ... We do not intend by raising this question to prescribe a standard of conduct that could be construed to interfere with the internal procedures of a trade union. A union may have adopted its own procedures, whether governed by regulations contained in its constitution or by past practice, for communicating business matters to its constituents. ... What the Board is concerned about in measure the conduct of union representatives during the negotiation process, is whether the employees affected have been treated honestly and in good faith. The adequacy of the settlement and the formal processes adopted in order to arrive at an accommodation are not necessarily an issue. What is an issue is whether the trade union by its conduct has acted fairly in the interest of employees in dealing with the employer with respect to their terms and conditions of employment. ..."

- In the instant case, there is no doubt that when Mr. Redermeier concluded the settlement of June 28-29, he thought that he was acting in what he believes to be the best interests of the members even if those members did not appreciate it. There was no personal gain involved. Mr. Redermeier was responding to the situation as he saw it. In recent weeks, the membership had been ignoring the law and acting more like an unruly mob than a disciplined union organization; moreover there seemed to be little understanding of the economics of the situation, the Labourers' threat, or the potential ramifications of a strike. The members (Mr. Bickle being an example) seemed intent on a strike regardless of the law and regardless of the consequences. Yet many of the same employees who were publicly protesting "concessions", were privately working for less than the contract rate.
- 259. Without effective "policing language" Redermeier feared that the collective bargaining

framework would breakdown into a "dog eat dog" environment, which, in the end, would undermine both the wage rates and the union itself. Wage concessions had been given in other parts of the province (Kingston, London) to protect the members' access to work. In that regard the proposed settlement was not particularly novel. On the other hand, strict policing language was a useful precedent that was to become part of both the ICI and residential collective agreements, and might stem the flood of grievances that was becoming increasingly unmanageable.

- 260. This was a plausible position for Mr. Redermeier to take. Indeed, from an objective point of view, it may even be the most reasonable course of action for the union to take. And had Mr. Redermeier simply told employees that, and acted accordingly, I do not think that he could be faulted.
- 261. The decision might have angered employees. It might have prompted members to go over to the Labourers' Union. It might have fuelled a later termination of the union's bargaining rights. But I doubt that it could be characterized as arbitratory, discriminatory, or undertaken in bad faith.
- On June 26, Mr. Redermeier assured the membership that he would not accept a wage rollback, that he would not settle without their further involvement, that he would not conduct further negotiations without Mr. Bickle's attendance, and that he would attend the assistance of a conciliation officer and could take the steps to arrange for a timely strike vote. However he did not none of those things. Barely two days later, he did precisely the opposite.
- Was there any reason for this sudden change of heart? Was there any reason why Mr. Redermeier could not have followed through with his undertakings? Was there any reason why negotiations could not have proceeded a little longer, without a strike, and while parallel meetings with the members continued? Would conciliation not have helped to reach an accommodation? Would a strike vote not have increased the union's leverage even if no strike were ultimately called? And, most important, was there any reason why Mr. Redermeier had to sign a settlement that Wednesday, having told the members that he would not do so only two days before?
- No reasons were advanced. One can only conclude that Mr. Redermeier thought that it was appropriate to mislead the members "for their own good". That may have been an understandable human reaction especially when faced with the angry and unruly group who attended the June 26th meeting. However, it was wrong to make the undertakings that he did, then immediately do the reverse.
- I conclude therefore that on June 26, 1995 (but only on June 26), Helmut Redermeier, on behalf of Local 675, was acting in bad faith, and contrary to section 69 of the *Labour Relations Act*.

266. The objective employees' primary remedial argument was that a breach of section 69 should prompt the Board to set aside the proposed residential agreement and the ICI amendments. I have some doubt whether the Board has the authority to do that, or whether it would be appropriate, where, as here, the employers have not acted improperly (see the remarks of the Board in Cuddy Foods Products Ltd., supra, at pages 1240-12-43). It is one thing to require an employer to engage in an arbitration process that would have been triggered in any case, or deal with a grievance that would have been processed "but for" a union's default. It is quite another to set aside a collective agreement that an employer has bargained in good faith.

- However, I do not have to explore that option in this case, because I have already found for other reasons (see above) that the settlement was ineffective. Nor is it necessary to pursue the employees' damage claim against Local 675 (which in effect would come out of the members' own pockets) or perhaps that OPC, because, at most, what they have lost is a couple of weeks of bargaining and the opportunity for some further "input" into the ultimate result. Since bargaining has been ongoing for some months and must now continue, the employees will have the opportunity for further participation.
- 268. I do think that it is appropriate to make a declaration that section 69 has been breached on the single occasion mentioned above, and to require Local 675 to hold a further membership meeting so that the Local officials and members can consider their positions in light of this decision and the need for continuing negotiations.
- 269. It is so ordered. I also direct that a copy of the summary at the end of this decision be provided, at the union's expense, to each member of Local 675.
- 270. In my view, it is not appropriate to make any further directions about how those negotiations should now be conducted or what ratification process (if any) must be employed. In particular, I make no order or directions concerning Mr. Redermeier's future conduct of the affairs of Local 675 or the actions that obtaining a settlement may require. Although he may have acted inappropriately at one union meeting (under especially trying circumstances), it is clear that throughout his stewardship, he has always acted in what he genuinely believed to be in the best interests of the Local and its members.

The Trusteeship

- 271. Section 138.5(1) and 84(1) of the Act read as follows:
 - 138.5-(1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere with a local trade union directly or indirectly in such a way that the autonomy of the local trade union is affected.
 - **84.-** (1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within sixty days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.
- The evidence establishes that by the end of March 1995, the affairs of Local 675 were in disarray. Its senior officers had defected to Local 183, which was then mounting a campaign against Local 675 that threatened the very existence of the Local. Subordinate officials had also departed. There were serious doubts about the loyalty of administrative staff. A number of union members had deserted the local to join the rival union. And no one knew the extent to which the administration of the local had been subverted or whether funds had been misused or misappropriated. The ongoing activities and the day to day direction of the Local had been seriously undermined.
- 273. In the circumstances, it was entirely reasonable for the parent International Union to assert control, as it was entitled to do under the terms of the International Union Constitution. The remaining (loyal) officers of Local 675 had requested the parent union to intervene. It was nei-

ther unreasonable nor unjust to impose what Mr. Redermeier described as a "friendly supervision".

- The parent union was not obliged to hold new elections, when the Local itself was in turmoil and exposed to external attack. Trusteeship was an appropriate instrument to restore control.
- 275. Section 138.5 appears to focus on the *imposition* of a trusteeship, rather than the *actions* of the trustee. However, even assuming that the behaviour of the trustee is regulated by section 138.5(4) (or perhaps section 69) I am unable to find anything wrong with the way that Mr. Smith conducted himself.
- 276. I do not think that Mr. Smith acted inappropriately in appointing Mr. Redermeier, the Acting Business Manager. Given Mr. Redermeier's long experience as an official of the Local, he was a reasonable choice to fill-in temporarily, and to step into the negotiating process that Gus Simone had abandoned. Nor do I think that Redermeier's selection makes Smith or the parent union personally responsible for Redermeier's behaviour on June 26, 1995. Mr. Redermeier should not have misrepresented his intentions at the tumultuous meeting of June 26. But this default does not undermine the legitimacy of the trusteeship.
- 277. I see no reason to tinker with the terms of the trusteeship. If anything, the uncertainties arising from this litigation may require *more* direct intervention by the parent union particularly since quite a number of members of Local 675 (and perhaps some local officials) seem prepared to totally disregard the law and engage in unlawful strikes.

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- 278. Section 84(1) of the Act is a filing/information provision. The fact that the required documentation was filed a month late does not, in my view, impair the integrity of the trusteeship or the actions of the trustee. To the extent that there may have been a "breach" of the *Labour Relations Act*, it is a technical one only, for which no remedy is necessary.
- 279. The material required by section 84 was filed by the end of June, and was made available to those who might be interested in it, including the parties to this litigation. There is no evidence that anyone was actually prejudiced by the late filing or was actually unaware or deprived of the information contained in the filing.
- 280. This aspect of the employees' complaint is therefore dismissed.

Summary of Board Findings and Result

- 281. After eight days of evidence and argument the Board has reached the following conclusions:
 - 1. The parties bargained honestly and in good faith with a view to amending the ICI agreement to take into account the difficult economic situation that the contractors were facing (including a weak market for construction and non-union competition). The parties reached a settlement on June 28-29 which seemed sensible to them, and seemed to meet their common concerns.
 - 2. The parties agreed that wages would be reduced so that they would be more in line with what seemed to be the market rates that many

employees seemed to be working at anyway. A wage cut was considered necessary so that unionized contractors would continue to get work. In return, the contractors agreed to language that would require all employees to adhere to the agreement. The parties agreed that this was a sensible trade off in difficult times.

- 3. However the Carpenters' Ontario Provincial Council, for its own good reasons, refused to agree to the ICI changes, so that, insofar as the ICI is concerned, the proposed amendments are ineffective.
- 4. The bargaining parties never intended that there would be a "stand alone" residential agreement, separate and distinct from the situation in the ICI sector. The only common intention never realized was that ICI and residential changes would take place together.
- 5. When the proposed ICI amendments were rejected, the basis for the residential agreement was discarded. If Local 675 and ISCA wish to renew the now expired residential agreement, they will have to return to the bargaining table to pursue that objective. Similarly, they will have to continue discussions about the appropriate changes (if any) to the ICI agreement.
- 6. When Helmut Redermeier agreed to wage concessions in return for language compelling contractors to pay the contract rates, he was acting in what he believed to be the best interests of Local 675 and its members. He genuinely and reasonably believed that concessions were necessary and that a strike would be disastrous for the Local. Mr. Redermeier may right about that. Mr. Redermeier may also be right in his belief that the members of Local 675 do not fully understand that the consequences of a strike might be a permanent loss of work to other contractors.
- 7. Nevertheless, on June 26, 1995 Mr. Redermeier assured the membership of Local 675 that he would not sign a collective agreement granting concessions without consultation or ratification by the members, that he would have Doug Bickle at the next round of bargaining, that he would seek the assistance of a conciliation officer and that he would arrange for a strike vote. Instead of doing that, Mr. Redermeier signed a settlement, two days later that agreed to significant rollbacks. In so doing, the Board finds that Local 675 contravened section 69 of the *Labour Relations Act*. However, in all the circumstances, no remedy is appropriate other than this simple declaration.
- 8. The parent union had just cause to impose the trusteeship over Local 675. There is no reason to disturb the trusteeship or make any directions concerning the conduct of the trustee.

0082-95-U United Food and Commercial Workers International Union, Local 175, Applicant v. K & Son Maintenance Co. Inc., Responding Party

Collective Agreement - Duty to Bargain in Good Faith - Practice and Procedure - Remedies - Unfair Labour Practice - Union claiming that employer violating its duty to bargain in good faith by refusing to sign collective agreement following vote by employees accepting employer's "final offer" - Employer failing to file response prior to commencement of hearing - Board applying Rule 19 and deeming employer to have accepted all of the facts stated in application - Board deciding case on material before it without necessity of hearing evidence - Application allowed and employer directed to sign collective agreement ratified by bargaining unit

BEFORE: Kevin Whitaker, Vice-Chair, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: John L. Stout, John R. Evans and Fernando Reis for the applicant; Eyon Palmer for the responding party.

DECISION OF THE BOARD; August 9, 1995

- 1. This is an application under section 91 of the *Labour Relations Act* ("the Act") alleging that the respondent has breached section 15 of the Act. The applicant claims that the respondent has breached its obligation to bargain in good faith by refusing to sign the collective agreement which it had agreed to following a ratification vote.
- 2. The hearing of the application was originally scheduled for June 28 and 29, 1995. On agreement of the parties, the matter was adjourned and rescheduled for August 2 and 3, 1995. At the outset of the hearing an adjournment request made by the respondent was denied.
- 3. The respondent failed to file a reply prior to the commencement of the hearing. On this basis, the applicant made a preliminary motion that the Board issue an order pursuant to Rule 19 deeming the respondent to have accepted all of the facts stated in the application and further to decide the case upon the material before it without the necessity of hearing evidence. The parties confirmed that the applicant had put the respondent on notice of its intention to bring such a motion at a prior meeting in this matter with a Labour Relations Officer and further confirmed the advice to the respondent by letter dated June 15, 1995 to the Registrar, copied to the respondent. The applicant's motion was granted.
- 4. The Board indicated that it was not necessary for the applicant to provide argument and invited the respondent to make its submissions on the evidence before it. Having heard the submissions of the respondent and the applicant's reply, the Board issued the following order orally at the hearing:
 - 1. The Board orders that the responding party forthwith sign the collective agreement ratified by the bargaining unit on November 7th, 1994; and further
 - 2. The Board declares that the responding party has violated the *Labour Relations Act* and orders that the responding cease and desist from violating the *Labour Relations Act*.
- 5. Following the oral ruling at the hearing the Board agreed to provide the parties with written reasons to follow on the merits of the application. Those reasons comprise the balance of this decision.

- 6. On January 11, 1994 the applicant was certified as the exclusive bargaining agent for all employees of Active Building Maintenance engaged in cleaning and maintenance at 95 Grosvenor Street and 7 Queens Park Crescent in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisors. In February of 1994, the respondent became the successor employer of Active Building Maintenance for the maintenance services at 95 Grosvenor Street and 7 Queens Park Crescent in the Municipality of Metropolitan Toronto.
- On February 24, 1994 the applicant filed an earlier complaint with the Board under section 91 of the Act. The earlier application was settled by way of a Memorandum of Settlement dated April 28, 1994. As part of the Memorandum of Settlement, the respondent accepted that it was the successor employer to Active Building Maintenance in respect of the cleaning and maintenance services at 95 Grosvenor Street and 7 Queens Park Crescent. In May 1995 the applicant filed various applications with the Board alleging amongst other things that the employer had breached the Memorandum of Settlement dated April 28, 1994. In a decision dated November 3, 1994 the Board found that the respondent had failed to comply with the terms of the Memorandum of Settlement.
- 8. Negotiations for a first collective agreement between the parties began on June 27th and continued through to August 19, 1994. Conciliation took place in September and mediation occurred on October 31, 1994.
- During the bargaining session on July 13, 1994 the union presented a wage proposal to the employer containing two classifications, those of day shift co-ordinator and cleaner. Each classification had a wage rate attached to it. The respondent's counter-proposal during the bargaining session on July 13, 1994 was a three per cent across-the-board increase in the first year, a 2.5 per cent increase across-the-board in the second year and a 2.5 per cent increase across-the-board in the third year. The employer at no time objected to there being two classifications, those being the day shift co-ordinator and cleaner. Throughout the balance of bargaining the respondent did not object to there being the two classifications of day shift co-ordinator and cleaner.
- 10. In August 1994 the applicant accepted the respondent's proposal of \$9.23 as the base rate from which to begin negotiating wage increases for the day shift co-ordinator.
- The respondent's offer was presented to the applicant's bargaining unit on October 3rd and 4th, 1994 for purposes of ratification. The offer was rejected and a short strike followed. The same offer was put to the bargaining unit during a second ratification vote held on November 7, 1994. At that point the offer was ratified by the bargaining unit. The respondent was immediately advised by facsimile that the bargaining unit had ratified its last offer.
- 12. On November 15, 1994 the applicant mailed to the respondent a final version of the collective agreement which was identical in all respects to the employer's last offer at conciliation. On November 24, 1994 the principal negotiator for the applicant met with the president and general manager of the respondent. During this meeting, the respondent advised the applicant that that it would not sign the collective agreement because it did not want to include the day shift co-ordinator as a separate classification.
- Following this meeting and during December of 1994 and January of 1995 the union made a number of proposals in an attempt to deal with the respondent's change of position. Despite these proposals, the respondent was not prepared to sign the collective agreement which it had in effect proposed as its last offer at conciliation. The respondent's change of position was not brought to the attention of the applicant until after the respondent's proposal had been ratified by the applicant.

- 14. The purpose of the obligation to bargain in good faith is to safeguard the integrity of the collective bargaining process. In these circumstances, the respondent placed its position on the table and was content to have that position put to a ratification vote by the applicant. Once the applicant advised the respondent that the respondent's proposal had been ratified, the applicant had changed its bargaining position on the basis of the representation made to it by the respondent. As the Board commented in similar circumstances in *Spartan of Canada Limited*, [1985] OLRB Rep. Sept. 1420 at 1426:
 - 17. ... Having thus led the Union to alter its position in bargaining, albeit with ill intent, it is our view that the respondent cannot now be permitted to renege on the position which it had placed on the table. To hold otherwise, it seems to us, would introduce so fundamental an element of mischief into the collective-bargaining process, from the point of view of *either* side of the table, as to undermine the integrity of the process itself. ...
- 15. The analysis in *Spartan*, *supra*, stands for the proposition that once a position has been taken during bargaining, the party taking the position cannot renege from that position once the opposing party changes its position based on the representation made by the party taking the position. If this were to be permitted, no party could assume that the other's position was a serious proposal even at the point of deciding on whether to accept or reject it. Accordingly, the Board finds that the respondent has breached the provisions of section 15 of the Act.

1544-95-R International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Applicant v. **Olympus Plastics Ltd.**, Responding Party

Certification - Natural Justice - Practice and Procedure - Certification application date and terminal date falling within period of employer's summer shut-down - Employer posting Form B-4 in workplace as directed but, in view of shut-down, employees not receiving notice of application prior to terminal date - Board rejecting employer's argument that application *void ab initio*, but directing that terminal date be extended

BEFORE: Gail Misra, Vice-Chair.

APPEARANCES: Michael McFadden and Brian DeWagner for the applicant; John Mastoras, Stanley Joffe and Doug MacKenzie for the responding party.

DECISION OF THE BOARD; August 14, 1995

- 1. This is an application for certification in which the parties have reached agreement on a number of matters in dispute between them. However, the responding party raised a question about the alleged lack of notice of this certification application provided to employees and asked for a hearing before the Board on this issue.
- 2. The facts giving rise to the employer's concern are not in dispute. On July 14, 1995 the applicant (also referred to as the "union") applied for certification for all employees of the responding party in the city of Barrie, save and except supervisors and all those above the rank of supervisor. July 14, 1995 was also the date upon which this place of employment began its summer

shut-down, which ran until July 30, 1995. After July 18, 1995 no employees who may fall within the applicant's bargaining unit were at work. Employees returned to work on July 31, 1995.

- 3. The responding party (also referred to as the "employer") received notice from the Board of the certification application on July 21, 1995 and posted the Form B-4 "Notice to Employees of Application for Certification and of Hearing before the Ontario Labour Relations Board" on July 24, 1995. The terminal date set by the Board for this application was July 27, 1995. Neither the union nor the employer informed the Board of the plant shut-down. The Form B-4 has remained posted at the workplace up to the date of this hearing on August 14, 1995.
- 4. The employer's concern is that no employee who may be in the applicant's bargaining unit received notice of the certification application until after the terminal date had passed as the employees did not return to work until July 31, 1995. It is the employer's position that the employees cannot be said to have had notice of this application, either real notice or deemed notice, and since having notice is a fundamental aspect of the principles of natural justice, so this application should be found to be *void ab initio*. It is suggested by the responding party that it is the union's responsibility to inform the Board of the shut-down and since it did not do so, it bears the risk of having its application voided.
- The union maintains there is no basis for the Board to dismiss this application. It claims the union enjoys substantial support among the employees of the proposed bargaining unit (the count of employee support for the union has been made known to the employer at the Labour Relations Officer meeting of August 9, 1995). The union suggests the employees have known since their return to work on July 31, 1995 that the application for certification had been filed and that a hearing was scheduled before the Board on August 14, 1995. It is undisputed that no employee has expressed any interest in participating in this application or in the hearing. The union argues there has been no prejudice to the employer in the circumstances and it is not for the employer to come to the Board when it is a question of the notice to employees. The union further alleges that the employer in this case does not come to the Board with clean hands as it did not take any steps to inform the Board of the plant shut-down until it filed its response to the application for certification, dated July 27, 1995.
- 6. By way of reply the responding party states that it is not only employees who should have had notice, but any independent contractors or other unions who may have had an interest. It is suggested that if proper notice is not given one of any of the potentially-affected parties may come back to the Board at some later date and ask for the matter to be re-opened. The employer wants there to be some finality to this issue. The employer maintains that the situation cannot be rectified by the fact that the employees have now had notice since July 31, 1995 of this application and hearing date because the giving of notice is a mandatory requirement which cannot be waived, and cannot be discounted due to the apparent acquiescence of the employees in this case.

DECISION

7. It is noteworthy at the outset that there is no requirement in the *Labour Relations Act* for the giving of notice to employees of an employer where there has been an application made for certification of that workplace. However, Rules 28 to 33 of the Board's Rules of Procedure, outlined below, make reference to the Registrar's and the Board's powers to set terminal dates and the requirements of giving notice:

^{28.} The Registrar may set a terminal date in any proceeding.

- 29. Where a hearing will be held in a case, written notice of the hearing will be given to all parties setting out the time, date and place of the hearing.
- 30. Where the Registrar considers that it is impractical to give written notice of the hearing, the Registrar may give verbal or other notice of the hearing.
- 31. The Registrar may give directions as he or she considers necessary to provide notice to any person.
- 32. The Registrar or the Board may require any person to post notices. The Registrar or the Board may also give any directions about the posting, including when the notices must be posted, where, how many and for how long.
- 33. The applicant and any person directed to post notices must promptly inform the Registrar of the date and time of the postings.
- 8. For an employee's purposes, the terminal date on an application for certification is the date by which any employee who has filed a petition or re-affirmation relevant to the application in question must file a written statement containing some basic information to bring to the Board's attention that a petition or re-affirmation had been filed with respect to that particular application. This is to ensure that the Board can match up any petition or re-affirmation which may have been sent in prior to the application date for that application. Pursuant to section 8 of the Act however, the Board cannot consider any new petition or re-affirmation evidence filed after the application date. If any employee wishes to participate in the certification proceedings on an issue other than with respect to a petition or re-affirmation, a written statement must be filed with the Board by the terminal date.
- 9. The Form B-4 is a "Notice to Employees ..." and informs them of the application, of the terminal date, the significance of the terminal date if an employee has filed a petition or re-affirmation, or if an employee wishes to participate for some other reason, and informs employees of the application date, the date and place of the Labour Relations Officer meeting, and the date and place of the hearing. The name, address, and telephone number of the Registrar of the Board are included on the notice so that any person wishing to will know where to send their submissions or who to call at the Board for further information. It is noteworthy that the Labour Relations Officer meeting in this case was scheduled for August 9, 1995, more than one week after the employees had returned to work. No employee chose to attend at the Officer's meeting to participate in this matter. As noted earlier, no employee attended at the hearing to participate in the proceedings on August 14, 1995.
- 10. I am troubled that neither the employer nor the union contacted the Board to inform the Board that the Form B-4 would be ineffective since no employees would be at work until after the expiration of the terminal date.
- 11. The employer was sent a Form B-5, "Notice of Application for Certification and of Hearing before the Ontario Labour Relations Board" on July 20, 1995. Paragraphs 2 and 3 of the Notice state as follows:
 - 2. You must post the enclosed Notices to Employees of Application for Certification and of Hearing (Form B-4) immediately. These notices are to be posted where they are most likely to come to the attention of all employees who may be affected by the application. (emphasis added) ...
 - 3. You must promptly inform the Registrar of the date and time of the postings. You may use the Return of Posting form attached.

- 12. By a facsimile dated July 25, 1995 Mr. Cliff Chandler, the Plant Manager for the employer, informed the Board that he had completed the posting on July 24, 1995. Part of the form completed and signed by Mr. Chandler informed the Board that:
 - (3) I posted all of the notices in the work place where they are most likely to come to the attention of all employees who may be affected by the application.

[emphasis added]

- 13. The union, upon receipt of its application for certification and at the same time as the employer is informed of the application, receives a Form B-2, "Notice of Hearing Certification before the Ontario Labour Relations Board". In the third paragraph of that notice it states as follows:
 - 3. You must promptly inform the Registrar as to whether Notices to Employees have been posted, and the date and time of posting, if known. You may use the attached Advice of Posting form.
- The Board's records disclose that no "Advice of Posting" form was returned to the Board to indicate whether the union had ascertained that the posting had been completed. As with the employer, the union did not inform the Board that no employees would be in a position to see the posted notice since they were not at work at the requisite time. The Board has deemed it helpful to have the union confirm that the employees have had notice of an impending certification application. Had the union in this case checked on the posting and had it then informed the Board that there was a plant-shutdown so that no employees were going to be at work, the Board would have had an opportunity to ensure that employees received the notices about the certification application.
- In all of the circumstances, it is therefore apparent that the employees affected by this application did not receive notice of the application prior to the expiration of the terminal date. While no employee has expressed any interest in participating since July 31, 1995, it is impossible for the Board to be satisfied that had proper notice been given no employee would have come forward. The Board has noted in its decisions that it has an institutional interest in ensuring that its processes and directives are adhered to by the parties involved (see *Ledcor Industries Limited*, [1993] OLRB Rep. Aug. 758). As the Board noted in *Vissers Nursery*, [1990] OLRB Rep. Sept. 989, it is concerned that employees whose rights are likely to be affected by an application should be given proper notice of such an application. At Paragraph 11 of that decision the Board indicated as follows:
 - 11.... If the Board has not been promptly advised of the posting problem, it may be necessary to extend the terminal date fixed for the application in order for proper notice to be given to employees, thus delaying the application's processing. ...
- 16. It was argued on behalf of the employer, relying on the decision of the Divisional Court in *Re Namusa Enterprises Ltd. and City of Etobicoke et al.* (1984), 47 O.R. (2d) 769, that the Board could not simply extend the terminal date in this application, but must make the application *void ab initio*. In that case the Court found that the municipality had failed to give the applicant any notice of a meeting of the board of control and that the applicant had been given insufficient opportunity to make submissions in the circumstances of that case. It was held that the municipality had breached even the minimum duty to treat the applicant with fairness in the process. For this reason, and two other more substantive reasons, the Court quashed the resolution of the council of the city of Etobicoke. That case is entirely distinguishable from the case before me. In the case at hand no final determination has been made by the Board and none will be made until the employees of this responding party have had the notice which they would have had had the parties

informed the Board earlier of the plant shut-down. The employees will therefore be put in the same position which they would have been in but for the events which transpired in July 1995. There is therefore no issue of a breach of the duty of fairness in the process which the Board seeks to adopt.

- Since no certificate has yet issued in this case it would be most feasible in the circumstances to extend the terminal date to August 22, 1995 so that sufficient notice may be given to any employee who may wish to participate in these proceedings to make him- or herself known to the Board. The employer and the union have already met with a Labour Relations Officer and have reached agreement on all matters in dispute between them, except for this issue and the status of two employees. The Form B-4 will therefore not contain any reference to a meeting with a Labour Relations Officer, nor any reference to a hearing date before the Board. In the event that the Board receives representations from any employee the Board will assess such a representation to determine whether it raises any other issues which need to be dealt with by the Board. In the absence of any employee representations being made by the terminal date, the Board will process this application in the normal course.
- 18. This panel will remain seized.

0867-95-JD Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1089, Applicants v. United Brotherhood of Carpenters and Joiners of America, Local 1256, PCL Construction Limited, PCL Civil Constructors (Canada) Inc., PCL Constructors Inc., PCL Constructors Eastern Inc., PCL/McCarthy, a Joint Venture, Responding Parties

Construction Industry - Constitutional Law - Jurisdictional Dispute - Labourers' union and Carpenters' union disputing assignment of certain work in respect of construction of bridge across St. Clair River between USA and Canada - Board not accepting Carpenters' submission that construction of bridge in issue falling within federal labour relations jurisdiction - Board declining to disturb assignment of work made to Carpenters

BEFORE: D. L. Gee, Vice-Chair, and Board Members F. B. Reaume and G. McMenemy.

APPEARANCES: John Moszynski and Robert Leone for the applicant; N. L. Jesin and Ron Carlton for the United Brotherhood of Carpenters and Joiners of America, Local 1256; Bruce Binning for PCL Construction Limited, PCL Civil Constructors (Canada) Inc., PCL Constructors Inc., PCL Constructors Eastern Inc., PCL/McCarthy, a Joint Venture.

DECISION OF VICE-CHAIR, D. L. GEE AND BOARD MEMBER F. B. REAUME: August 2. 1995

1. This is a jurisdictional dispute proceeding brought under section 93 of the *Labour Relations Act* (the "Act"). A consultation was held on June 21, 1995. By way of a "bottom-line" ruling dated July 6, 1995 the parties were advised of the Board's determination that the work assignment

made by PCL/McCarthy, a Joint Venture (hereinafter "PCL/McCarthy") would not be disturbed. Our reasons for such ruling are as follows.

- 2. The work in dispute is described in the applicants' pre-hearing brief as follows:
 - all construction work undertaken by PCL [earlier defined as including all of the PCL companies named as responding parties] falling within the jurisdiction of the applicants pursuant to the Construction General Contract entered into by PCL with the Blue Water Bridge Authority and the Michigan Department of Transportation for the Canadian portion (between the abutment and the centre line) of the Blue Water Bridge Project in Sarnia, Ontario.
- 3. The Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1089 (the "Labourers") complain that PCL/McCarthy should assign some of the work in dispute to its members rather than exclusively to members of the United Brotherhood of Carpenters and Joiners of America, Local 1256 (the "Carpenters"). The Carpenters assert that the Board does not have the constitutional jurisdiction to deal with this dispute as the construction of the Blue Water Bridge falls within federal jurisdiction. If the Board does have jurisdiction, the Carpenters assert that, having regard to the usual factors considered by the Board in determining work assignment disputes, there is no basis for interfering with PCL/McCarthy's assignment of the work in question to members of the Carpenters.
- 4. The panel was provided with very few facts on which to determine the constitutional issue. The project in question involves the construction of a bridge, to replace one presently in existence, across the St. Clair River between Port Edward, Lambton County, Ontario and Port Huron, St. Clair County, Michigan. The construction of the bridge is a joint effort by Canada and the United States. PCL/McCarthy is a joint venture between a Canadian and an American company. The Canadian portion of the bridge (between the abutment and the centre line) will be constructed by Canadian workers. The American portion of the bridge will be constructed by American workers. A composite crew will be used to join the two portions.
- Based on the limited facts provided to us, it is our determination that we have jurisdiction to determine this dispute. As stated by the Supreme Court of Canada in Montcalm Construction Inc. (1978), 93 D.L.R. (3d) 641 at 652, primary federal competence over a given subject can only prevent the application of provincial law relating to labour relations if it can be demonstrated that federal authority over labour relations is integral to federal competence. In our view, it cannot be said that control over the employees who will be building the bridge is integral to Parliament's ability to eventually operate the bridge. The bridge will not be in operation while it is being constructed. The fact that provincial labour law will apply to the Canadian employees engaged in the construction of the bridge will have no impact on Parliament's exclusive authority, upon completion, to operate the bridge. Except for the minimal work which will be done by the composite crew which joins the Canadian and American portions of the bridge, there is no suggestion that the workers engaged on the project will be required to cross either provincial or international boundaries. In our view, the fact that the bridge will cross an international boundary (the factor relied upon to distinguish this case from Toronto Dominion Bank, [1992] OLRB Rep. Oct. 1123) does not result in the construction of the bridge becoming integral to Parliament's authority to operate the bridge. Thus, the Labour Relations Act applies to the work in dispute and we have jurisdiction to determine its proper assignment.
- 6. We turn then to consider the merits of the dispute.

- 7. The Labourers assert that they have a collective bargaining relationship with PCL/McCarthy, either by virtue of a project agreement which the Labourers and the Carpenters had been jointly negotiating with all of the Canadian contractors who had pre-qualified to bid on the job, or by virtue of the fact that PCL Constructors Eastern Inc. (to which the Labourers assert PCL/McCarthy is related) is bound to the agreement between the Ontario Formwork Association and the Formwork Council of Ontario (the "Ontario Formwork Agreement").
- 8. We do not conclude that the Labourers have bargaining rights with respect to PCL/McCarthy on either of the two bases asserted. PCL/McCarthy asserted throughout the negotiations with respect to the project agreement that it would not enter into the project agreement with the Carpenters and Labourers unless all of the contractors who had pre-qualified to bid on the project signed. None of the contractors, including PCL/McCarthy, ever signed the project agreement. The Labourers thus cannot rely on such agreement to establish bargaining rights for PCL/McCarthy.
- 9. Assuming (without finding) that PCL Constructors Eastern Inc. and PCL/McCarthy are related employers, PCL Constructors Eastern Inc. is bound to the Ontario Formwork Agreement by virtue of a cross-over clause contained in the MTABA Agreement. The MTABA agreement, however, stipulates that its terms and conditions are recognized only within Board Area 8. The work presently in dispute is not within Board Area 8. Thus, even if it was determined that PCL/McCarthy and PCL Constructors Eastern Inc. are related employers, such that PCL/McCarthy is bound to the Ontario Formwork Agreement, such would not result in the Labourers having bargaining rights for work which arises outside of Board Area 8. In the result, the Labourers do not have bargaining rights with PCL/McCarthy which cover the work in question.
- 10. On May 3, 1995, PCL/McCarthy entered into a collective agreement with the Carpenters whereby PCL/McCarthy recognized the Carpenters as bargaining agent for all of the employees of PCL/McCarthy performing work on the Blue Water Bridge Project. Further, PCL Constructors Eastern Inc. is bound to the Carpenters' province-wide Heavy Engineering Agreement. Thus, if PCL Constructors Eastern Inc. and PCL/McCarthy are related employers, as asserted by the Labourers, it appears as if the Carpenters may have a collective agreement based claim to the work.
- Relying on the Board's decision in *Pigott Construction Limited*, [1992] OLRB Rep. June 748, the Labourers assert that, even if they have no collective bargaining relationship with respect to PCL/McCarthy, they have a valid claim to the work as there is an existing trade agreement between the Labourers and the Carpenters which provides that the work will be assigned to composite crews comprised of members of both unions. The Labourers assert that they and the Carpenters agreed to jointly negotiate with the contractors towards a project agreement (which would provide for the assignment of much of the work on the project to composite crews), that all of the contractors would be offered the same terms and conditions, and that neither of the unions would negotiate any departure from those terms with any of the contractors. The agreement between PCL/McCarthy and the Carpenters is thus in violation of the "trade agreement" between the Labourers and Carpenters. The Labourers ask that the PCL/McCarthy agreement with the Carpenters be set aside, and that PCL/McCarthy be required to assign the work in accordance with work assignment provisions contained in the last circulated draft of the project agreement.
- 12. The Carpenters acknowledge that they agreed to jointly negotiate with the Labourers towards a project agreement with the five contractors. Such agreement (and thus the work assignment provisions contained therein) was, however, conditional on the project agreement being signed by all five of the contractors. They assert that there was no agreement that, if the contractors.

tors refused to sign, neither union would attempt to reach an individual agreement with any one or more of the contractors. The Carpenters assert that they did not enter into an agreement with PCL/McCarthy until it became apparent that none of the contractors intended to sign the project agreement. The agreement reached with PCL/McCarthy stipulates that it will not take effect if all five contractors reach an agreement with the Labourers and Carpenters. Thus, the Carpenters assert that they did not breach their agreement with the Labourers.

- It is not necessary for us to determine whether the Labourers' or the Carpenters' version of the terms of the agreement reached is the accurate one. Assuming the Labourers' version to be accurate, we would not accord the agreement any weight in determining the proper assignment of the work in dispute. The agreement in question was between the Labourers and the Carpenters. PLC/McCarthy was not a party to the agreement. There is no evidence that PCL/McCarthy was aware of an agreement between the Labourers and the Carpenters to the effect that they would not negotiate individually with the contractors. PCL/McCarthy had no pre-existing collective bargaining relationship with either the Carpenters or the Labourers. There is no suggestion that PCL/McCarthy was not acting in good faith when it entered into a collective agreement with the Carpenters. PCL/McCarthy assigned the work in dispute to members of the Carpenters on the basis of their collective agreement based right to the work. Under such circumstances, even if the trade agreement asserted by the Labourers was reached, it would not cause us to overturn the assignment of the work made by PCL/McCarthy and require PCL/McCarthy to assign the work to members of the Labourers, with whom it has no collective bargaining relationship.
- 14. The area practice evidence indicates that the Labourers have performed work in connection with a number of bridges and overpasses built in Lambton County. The Carpenters have performed work on two existing bridges. Thus, the area practice evidence favours the assignment of the work to the Labourers.
- 15. There is no evidence with respect to the employers' past practice. We find the factors of skills and training, economy and efficiency to be neutral.
- As the Board stated in *Groff & Associates Ltd.*, [1994] OLRB Rep. July 846, a trade union that does not have a collective bargaining relationship with the employer which assigned the work in dispute is likely to have a difficult time in having the assignment altered. In our view, the area practice evidence which favours the Labourers is not sufficient to outweigh the fact that the Labourers do not have an applicable collective agreement with PCL/McCarthy and that the Carpenters do have such an agreement.
- 17. Accordingly, we confirm our bottom-line ruling of July 6, 1995 in which we declined to disturb the assignment of the work made by PCL/McCarthy to the Carpenters.

CONCURRING OPINION OF BOARD MEMBER G. MCMENEMY; August 2, 1995

- 1. While I concur with the majority decision, I would like to comment on the nature of the events that led up to the filing of this complaint.
- 2. The two local unions involved in this case must be commended on the co-operative approach they initially embarked upon in an attempt to achieve a project agreement which would enable the contractors and their union members a better chance to bid on and obtain the contract for the construction of the Blue Water Bridge.
- 3. However, for whatever reasons, the project agreement arrived at by this co-operative approach, was never executed or signed by any of the five contractors or the two unions.

- 4. At some point in time, the carpenters local union entered into separate and single negotiations with the contractor who was to become the successful bidder on the bridge project. The carpenters' local signed a "Letter of Understanding" with PCL/McCarthy on April 3, 1995. This letter referenced terms and conditions that were very different than the terms of the co-operative agreement.
- 5. At no time did the carpenters' local communicate to the labourers' local that they had abandoned the co-operative agreement and that they were going to do whatever was necessary to acquire the work for their members or, for that matter, that they were in the process of negotiating a project agreement with PCL/McCarthy.
- 6. It is this lack of common courtesy, the failure to notify the partner in a co-operative venture of your withdrawal, that I find troubling.
- 7. Given the history of these unions in the construction industry of Ontario, the abandonment of joint negotiations without notice to the other party will do nothing but further the mistrust and ill feelings between not only these two locals but other locals of both international unions in the province.
- 8. I would hope that the two union parties involved in this jurisdictional dispute could before the job begins, or at least during the job, try to repair the mistrust and ill feelings generated by this unfortunate dispute.

0122-95-R United Steelworkers of America, Applicant v. Pepsi-Cola Canada Ltd., Responding Party

Bargaining Unit - Certification - Constitutional Law - Board determining that employer's primary business not that of a common carrier, despite holding of common carrier license - Board finding that employer's labour relations falling within provincial jurisdiction - Union applying for certification and proposing bargaining unit composed of drivers and drivers helpers - Employer asserting that bargaining unit should include warehouse personnel - Board determining that unit proposed by union not appropriate

BEFORE: Pamela Chapman, Vice-Chair, and Board Members W. H. Wightman and Pauline R. Seville.

APPEARANCES: P. Turtle, G. Gibson and Alex Milne for the applicant; James B. Noonan and Kurt E. Twining and Bruce Allen for the responding party.

DECISION OF THE BOARD; August 8, 1995

- 1. This is an application for certification.
- 2. In response to the application, the responding party ("the employer") takes the position that the Board has no jurisdiction to hear and determine this matter, as the labour relations of the employer falls within the scope of federal, rather than provincial, jurisdiction. The applicant ("the

union") disputes this assertion, taking the position that the application is within the jurisdiction of the Board.

- 3. In addition to the jurisdictional issue, the parties disagree as to the appropriate bargaining unit. The union seeks the exclusion of warehouse personnel; the employer takes the position that these employees should be included and that the unit proposed by the union is not appropriate for collective bargaining purposes.
- 4. At the hearing of this matter on May 10, 1995, the Board heard the submissions of the parties on the issue of constitutional jurisdiction, and on the bargaining unit dispute, and reserved our decision.
- 5. As the two issues are quite distinct, we have dealt with them separately below.

CONSTITUTIONAL JURISDICTION

The Facts

- 6. The parties entered into an agreed statement of fact, which was filed with the Board. As it is quite lengthy, it is not reproduced here. Instead, we will set out a brief summary of the key facts relating to the issue of constitutional jurisdiction.
- 7. The parties are agreed that the correct name of the legal entity which is the employer in the present application is Pepsi-Cola Canada Ltd. ("Pepsi Canada"), as reflected in the title of proceedings. They agree further, however, that the application relates only to certain employees of Pepsi Canada at its PFS Division in the City of Mississauga ("PFS Canada"). Both Pepsi Canada and PFS Canada are related to Pepsico Inc. ("Pepsico"), a larger corporate entity based in the United States.
- 8. The parties filed an organizational chart which shows the basic corporate structure of Pepsico. In essence, it reveals that Pepsico is made up of a number of divisions, including Pepsi-Cola North America, Frito-Lay, Pizza Hut International, KFC ("Kentucky Fried Chicken") International, Taco Bell International, and PFS.
- 9. Pepsi Canada, like Pepsico, is involved, among other things, with developing, operating and franchising Pizza Hut, Taco Bell and Kentucky Fried Chicken restaurants. PFS is a division of the companies which warehouses and distributes product to these restaurants, both those directly operated by the companies and those run by franchisees. While PFS Canada is legally a part of the corporate entity Pepsi Canada, the head of operations for PFS Canada reports to PFS in the United States, which as noted above forms a part of Pepsico.
- 10. PFS Canada operates a warehouse in Mississauga, out of which all of its employees in Canada work. These employees include truck drivers, driver helpers, warehouse personnel, office and clerical personnel, sales staff, and management personnel.
- 11. Product to be supplied to the restaurants by PFS Canada includes a wide variety of fresh and frozen foods, dry goods, and paper products. This product is delivered to the warehouse in Mississauga by local and international suppliers, or by drivers employed by PFS, in the case of some products like flour. Some products are delivered to the warehouse by PFS drivers on "backhauls": they pick up items such as pepperoni and cheese on the way back from trips into Quebec to deliver product and return them to the warehouse for distribution to other restaurants.
- 12. Product is then delivered to the various restaurants throughout Canada. Drivers

employed by PFS Canada make truck deliveries to Pizza Hut and Taco Bell stores in Ontario and Quebec; PFS contracts with independent trucking companies to deliver product to Atlantic and western Canada.

- 13. Approximately 20 to 25% of the regular trips made by PFS Canada drivers are extra provincial into the province of Quebec.
- 14. PFS Canada has held a common carrier license since 1989, which it keeps current. All of its drivers hold AZ commercial tractor trailer licenses which authorize them to truck product anywhere in Canada.
- There is only one example, however, of PFS Canada operating as a common carrier and as such making use of its license. Between the middle of 1992 and the end of 1993, PFS drivers delivered salads prepared by a Quebec supplier to the Quebec warehouse of a distributor, for delivery by the distributor to Kentucky Fried Chicken restaurants in Quebec.

Decision

- 16. Having carefully considered the facts summarized above, the submissions of the parties made at the hearing, and the authorities filed with the Board, we have concluded that the labour relations of the responding party falls within provincial jurisdiction, and that as a result this application is within the jurisdiction of the Board. Our reasons for this conclusion are set out below.
- 17. The parties agreed upon the constitutional framework within which the jurisdiction of the Board must be considered. The labour relations of companies employing persons within the province of Ontario are presumptively within the legislative competence of the province as falling within "property and civil rights" under section 92(13) of *The Constitution Act*. The labour relations of any federal work or undertaking, however, are within federal jurisdiction, including those which fall within the ambit of section 92(10)(a):

92(10)(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

- 18. In the present case, the responding party relies upon section 92(10)(a) of the Constitution, arguing that PFS Canada is engaged in inter-provincial transportation and as such falls within federal jurisdiction with respect to labour relations.
- 19. This Board and the Canada Labour Relations Board have considered the constitutional jurisdiction of employers engaged in the trucking of product over provincial boundaries in numerous previous cases, and certain principles have emerged from this jurisprudence.
- 20. First, it is clear that an employer whose primary business is that of a common carrier, regularly and continuously carrying goods or persons over provincial boundaries, will be considered to fall within federal jurisdiction (*Re Tank Transport Ltd.*, (1960) 25 D.L.R. (2d) 161 (Ont.H.C.)).
- Where, however, an employer in the business of producing, distributing or selling goods transports those same goods, rather than persons or goods belonging to others, the transportation enterprise has generally been found to be provincial in nature, unless that aspect of the business is severable from the rest of its operations (*Catalano Produce Ltd.*, [1975] OLRB Rep. Oct. 743; Westburne Industrial Enterprises Ltd., [1984] OLRB Rep. Oct. 1525).

- 22. The responding party asserts that PFS Canada falls within the former category, as it holds a common carrier license, and has on at least one previous occasion carried goods for another company. The employer also emphasizes the independence of PFS Canada from the rest of Pepsi Canada, noting the reporting structures which result in a closer relationship with PFS headquarters in the U.S. than with the Canadian parent company.
- We have considered these arguments carefully, but having regard to the facts in this case, must reject them. First, it cannot be said that PFS Canada is engaged in the business of a common carrier, despite its possession of a license permitting it to do so. The evidence clearly discloses that PFS Canada carries goods to Taco Bell and Pizza Hut restaurants, which are either owned or franchised by the employer. While the responding party emphasized the one period during 1992 and 1993 when goods were delivered to another company, this transaction cannot even be considered to be truly arms length in nature, given that the company in question was a distributor which in turn delivered the goods to KFC restaurants owned or franchised by Pepsi Canada. In any event, a single episode of such common carrier activity does not change the essential nature of PFS Canada.
- 24. For many of the same reasons, it is clear that PFS Canada cannot be severed from the business of Pepsi Canada. As it only services the restaurants owned or franchised by the parent company, and has no independent business as a common carrier, PFS Canada would have no existence without the business of Pepsi Canada. Indeed, the integration of the enterprises is clear from a reading of the policy manual, which states in the introduction for new employees that the goal of PFS Canada is to enhance the efficiency and profitability of Taco Bell and Pizza Hut restaurants, which is achieved by tailoring the products and services provided by PFS to meet the specific needs of each restaurant. As union counsel submitted, PFS Canada operates as an indivisible supply arm to that part of Pepsi Canada which operates the restaurants, despite the organizational structure which links it to PFS in the U.S.
- 25. It is also significant, although not determinative, that PFS Canada is a part of the corporate entity which it services, Pepsi Canada (see for example *Fleetwide*, [1986] OLRB Rep. Sept. 1216, where the Board found that a separate numbered company engaged in deliveries out of province was nonetheless integral to the operations of a provincial manufacturing company and thus within provincial jurisdiction).
- 26. Similar considerations were central to the decision of the Board in *Westburne Industrial Enterprises Ltd.*, supra, as summarized at paragraphs 12 and 13 of that decision:

. . .

12. This Board is of the opinion that this case more closely resembles *Dominion Dairies*, supra, than Ottor Freightways, supra. To be sure, Distribution Services is a separate Division of Westburne Industrial Enterprises Ltd. However, this is a function of the size of Westburne, or perhaps its corporate organizational philosophy, rather than evincing a different relationship between the transportation "arm" and the enterprise itself. The fact that West-burne is engaged in buying and selling goods, rather than their manufacture, is not sufficient to distinguish the Dominion Dairies approach to the constitutional issue in view of the decision in Humpty Dumpty Foods, supra, where the operation was a distribution centre and was found to be under provincial jurisdiction. Distribution Services is not only not a separate corporate entity, it is not a common carrier. This is a crucial factor, in the Board's view. It is the status as common carrier which is determinative to the characterization of the operations in Ottor Freightways, Winner and Tank Truck, supra, as interprovincial "undertaking". Distribution Services is merely the "in-house" freight-forwarding arm of Westburne. Distribution Services derives all of its business from Westburne and is completely depen-

dent on Westburne for its continued operation. That Distribution Services must compete with common carriers to provide transportation services for their Divisions of Westburne is merely a means of ensuring that the other Divisions in no way subsidize the operation of Distribution Services. It does not change the characterization of those operations with respect to the constitutional issue.

- Further, although the individuals in the proposed bargaining unit work directly for Distribution Services Division, the only "legal entity" which could be the "employer" is Westburne Industrial Enterprises Ltd. Thus, the Board rejects the respondent's argument that Distribution Services is the "employer" and the "business" of the employer is an interprovincial undertaking within the meaning of section 92(10)(a) of The Constitution Act. Moreover, Distribution Services Division, at least while it remains an in-house delivery arm of the corporation, cannot be said to operate a transportation business as did the firms in Winner, supra, Tank Truck, supra, etc. In this regard, it is interesting to note that, although the total number of persons in the bargaining unit has not been resolved, there is a maximum of fourteen (14) individuals in the respondent's view and seven (7) in the applicant's view. In Dominion Dairies, supra, there were nineteen (19) individuals in the proposed bargaining unit. This Board does not believe that the reasoning in Dominion Dairies is not applicable to this case simply because the proposed bargaining unit members here are formally within a "Division" of a corporation whereas in Dominion Dairies there was not an identical organization structure. This would be placing form over substance. And the substance is that, in both instances, the individuals perform the same function, i.e., providing the in-house delivery service for the company. In neither instance, were the "business" those of common carriers so that the regular, ongoing nature of that business would properly result in characterization as "interprovincial undertakings" and, hence, under federal jurisdiction.
- In the cases relied upon by the employer, however, where trucking operations were found to fall within federal jurisdiction, significant common carrier activity had been established. Thus, for example, the Canada Labour Relations Board ("C.L.R.B.") found in *Burns Foods (Transport) Ltd.* (1990), 81 di 114, at page 115, that "the regular and continuous interprovincial transportation of goods for other companies, the majority of which are back-haul trips", was a distinct feature of the operations of the employer which brought it within federal jurisdiction. The C.L.R.B. noted that the employer held itself out as a common carrier and had developed a practice of carrying general freight for others on return journeys, on a daily and weekly basis, resulting in additional revenues for the company. Similarly, in *J.C. Fibers Inc.*, (1994), 94 di 1, the C.L.R.B. characterized the trucking aspect of the employer's business as "general transportation for third parties", which was carried out on a regular and continuous basis across provincial borders, accounting for between 27% and 46% of total transportation activity.
- 28. For these reasons, we have concluded that PFS Canada, despite the license it holds, cannot be characterized as operating the business of a common carrier. Rather, it is an integrated part of Pepsi Canada, which is a company within provincial jurisdiction. In these circumstances, we find that PFS Canada is not a federal work or undertaking, and that its labour relations fall within provincial jurisdiction.

APPROPRIATE BARGAINING UNIT

The Facts

- 29. The union proposes a unit made up of drivers and driver helpers; the employer asserts that this unit is not appropriate and that it should include warehouse personnel.
- 30. As noted above, the statement of facts filed by the parties was quite lengthy, so we have reproduced only a summary of the main facts relating to the bargaining unit issue.

- 31. The only employees who are permitted to drive trucks are the drivers, who as noted above are required to hold commercial licenses, as well as a clean record. Both drivers and warehouse employees, however, occasionally do redeliveries of small amounts of product after a regular run has been made, although it is not clear from the agreed statement of facts what kind of vehicle would be used in the event that a warehouse employee made such a delivery.
- Warehouse employees load the trucks prior to deliveries being made by the drivers. When drivers arrive at their destinations, they unload product from their trucks into the restaurants. Neither drivers nor driver helpers generally load the trucks, except during the course of training. When a new driver is hired, he may assist in loading a vehicle and will spend a few days in the warehouse in order to familiarize himself with the product. New drivers are then assigned to work as driver helpers as training, and the driver helper who is displaced then works in the warehouse for the training period, which normally lasts one month. Driver helpers may also assist in the warehouse when road hours are reduced, which is usually 4 to 6 hours per week.
- 33. Driver helpers assist drivers to make deliveries, mostly on specific downtown routes. Warehouse employees do not usually go out on the delivery routes, although approximately 8 to 10 times per year a warehouse employee may be assigned to act as a driver helper on other than an overnight run.
- 34. The unloading of backhauled product is normally done by either warehouse employees or a driver assigned to work as a "shunt driver". Each day, one driver is assigned to work as the shunt driver, to do unloading, move trucks, clean trailers, fuel trucks and deliver trucks for maintenance.
- 35. Routine maintenance in the warehouse is done by warehouse employees, and occasionally by driver helpers or the shunt driver.
- 36. When drivers are put on light duty, they normally work in the warehouse doing jobs which do not require lifting or sitting for extended periods.
- 37. Prior to loading trucks, warehouse employees pre-cool reefer equipment; this is done by the drivers on return trips where they are backhauling product.
- 38. Warehouse employees use itemized lists of product called "pick sheets", which are generated by the office, to load trucks for each delivery. After loading, this sheet is provided to the driver who uses it to check off items as product is delivered. Drivers also fill out additional paperwork, and input information on an ongoing basis into a computer terminal mounted in their trucks, which is then printed back at the office.
- Warehouse employees generally work eight hours a day, five days a week, on a rotating schedule of morning and afternoon shifts which provides for seven day a week coverage. Drivers spend very little time at the warehouse, as they typically arrive late at night to pick up their loaded trucks and begin their routes. They may return to the warehouse at any time during the day. Drivers work thirteen to fifteen hour shifts three or four days in a seven day period, often overnight, clocking in and out on the tripmaster.
- Warehouse employees and most of the drivers are paid an hourly wage; the drivers' wage is on average \$1.50 per hour higher. Four drivers are paid a weekly salary to do the twice-weekly Quebec City runs. Drivers are provided with a calling card, gas card, and a cash float to cover expenses while travelling. Warehouse employees and drivers have the same pay period.

- 41. Many other terms and conditions of employment are the same for drivers and warehouse employees, including:
 - (a) a benefit plan including medical, dental, vision and hearing coverage and life insurance;
 - (b) an employee stock option program;
 - (c) a sick leave policy;
 - (d) a uniform allowance which provides for company uniforms and safety boots;
 - (e) a single Christmas party and company picnic;
 - (f) an award system which identifies excellent employees;
 - (g) a pre-employment physical examination; and,
 - (h) a 90 day probation period.
- Warehouse employees and drivers bid for positions and vacation preference based on "departmental" seniority, and vacations are separately scheduled in each department. While no warehouse employee has ever become a driver, two warehouse employees have become drivers helpers. On three occasions in the last five years drivers have been transferred to work in the warehouse for medical reasons, because of personal choice, or as a form of discipline, and have subsequently returned to the driver job.
- There is a single Joint Health and Safety Committee at the workplace. In addition, both drivers and warehouse employees sit on "load committees" which last met in November, 1994.
- 44. All employees are covered by the same employee handbook, which sets out a code of conduct and a grievance procedure for all employees. For drivers, there is a further handbook called the "PFS Driver Specialist Information Manual" which details some of their job functions and establishes additional rules of conduct.
- There are three operations supervisors, who all report to the same operations manager. Drivers report to one of these supervisors on matters relating to the tripmaster system, to another for schedule problems, and to whichever one of the three is "on-call" in the event of problems on the road.

Decision

- 46. Having carefully considered the facts, the submissions of the parties, and the cases upon which they relied, we have concluded that the unit proposed by the applicant is not an appropriate bargaining unit for collective bargaining purposes. Our reasons are set out below.
- 47. The parties agreed that the test to be applied by the Board in determining whether or not the unit proposed by the applicant is appropriate for collective bargaining unit purposes is the one set out in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266:
 - ... does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

- 48. The normal practice of the Board, even before the *Hospital for Sick Children* decision, was to include drivers within a "production" unit, with exceptions in the dairy, bakery, and laundry industries (see for example the discussion in *Creeds Storage Ltd.*, [1985] OLRB Rep. Feb. 238). This approach is consistent with the Board's general aversion to classification based bargaining in other than craft settings.
- 49. The Board has said numerous times since the release of the *Hospital for Sick Children* decision that the approach to appropriate bargaining unit determinations will be as discussed in that case, rather than the more inflexible reliance on Board "policies" which was the former practice. In particular, the Board has noted that the concept of "community of interest" which was the focus of many earlier decisions is not particularly helpful in determining whether a proposed unit is appropriate, given that employees will have many different levels of community of interest depending on what aspect of their employment is considered (see for example *Active Mold Plastics Ltd.*, [1994] OLRB Rep. June 617 at paragraph 30).
- 50. At the same time, however, as the Board said in *Burns International Security Services Limited*, [1994] OLRB Rep. Apr. 347, at paragraph 30:

... This is not to say that history or existing practices are irrelevant. History can be a useful guideline to what is appropriate because established practices may reveal what works and what does not.

- 51. This comment seems particularly apt with respect to the Board's traditional resistance to classification based units. This preference for "all-employee" units is based not so much on the notion of community of interest, which in fact might favour classification based groupings, but on concerns about fragmentation, which is a concept which has certainly survived the shift in the Board's analytical approach since *Hospital for Sick Children*.
- 52. Indeed, a number of decisions issued in recent years seem to demonstrate the same resistance to classification based units as the Board has previously articulated. In *Ottawa Board of Education*, [1994] OLRB Rep. Dec. 1690, the Board rejected a proposed bargaining unit made up of continuing education instructors teaching Adult Basic Education and Adult English as a Second Language courses, stating at paragraph 11 that:

It is the Board's traditional concern about undue fragmentation as well as its general aversion to or at least caution in respect of classification based bargaining (in a non craft setting) which has been and continues to be problematic in relation to the bargaining unit currently sought by the applicant.

53. Similarly, the Board said the following in *Sifton Properties Limited*, [1993] OLRB Rep. Oct. 1010 at paragraph 29:

• • •

- 29. In many cases, the Board has underlined its reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmentation in bargaining which that creates, as expressed in the following passage from *Kidd Creek Mines Ltd.*, [1986] OLRB Rep. July 736:
 - 23. For many years the Board has been exceedingly reluctant to define bargaining units on the basis of employee classifications or employer departments, because of the high potential for fragmented bargaining which that creates (see, for example: Cryovac Division, W. R. Grace & Co. of Canada Limited, [1981] OLRB Rep. Nov. 1574; Toronto East General and Orthopaedic Hospital, [1981] OLRB Rep. Nov. 1672; University of Ottawa, [1981] OLRB Rep. Feb. 232; and Westeel-Roscoe Company

Limited, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry where departmental unionization has existed in the extreme (based initially upon craft distinctions which predated the current legislative framework), the Board has indicated that it might be less receptive to a continuation of these entrenched organizing patterns of the past, because computerized technology had revolutionized the structure and content of work in the newspaper business. (See Hamilton Spectator, [1981] OLRB Rep. Aug. 1177). Most recently, in T. Eaton's Company Limited, [1984] OLRB Rep. May 755 and Simpson's Limited, [1984] OLRB Rep. Sept. 1255, the Board reiterated its view that dividing an employer's business into bargaining units based upon departments would not be conducive to orderly collective bargaining. In Eaton's, for example, the Board refused to exclude a specialized department of computer salesmen from a broader "sales" bargaining unit, even though their skills, method of payment, and likely career opportunities were somewhat different from those of the other salesmen.

. . .

Concerns about the consequences of fragmentation are not idle speculation, nor have they escaped attention in other jurisdictions. Because of the problems associated with the proliferation of bargaining units in industrial enterprises, the policy in a number of provinces has now shifted away from the recognition of craft units or other similar subdivisions of employees. Following the recommendations of the Woods Task Force in 1968, Parliament amended the Canada Labour Code to delete the provisions (similar to section 6(3)) protecting craft bargaining units, and the circumstances in which an existing unit can be splintered are now closely confined (see Feed-Wright Limited, [1979] 1 Can. LRBR 296; Atomic Energy of Canada Ltd. (1978), 1 Can. LRBR 92; and Cablevision Nationale Ltée (1979), 3 Can. LRBR 267 and cases referred to therein). In British Columbia, craft units can be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in a manufacturing context. Even in the construction industry where craft unionism reigns supreme, the Ontario Legislature has intruded. In 1978, the Legislature imposed a system of province-wide bargaining by trade in place of the fragmented system of employer by employer bargaining which existed before. There is now a developing consensus that orderly collective bargaining is not enhanced by fragmenting an employer's work force into a number of competing bargaining units (for a thoughtful analysis of the issues see Paul C. Weiler: Reconcilable Differences: New Directions in Canadian Labour Law, Carswell's 1980 at pp. 151-178). Finally, since this Board may not have the power to later consolidate or rationalize the bargaining structure (as the Federal and B.C. labour boards can do), we should be particularly careful in fashioning the bargaining unit in the first place.

The Board has departed from that approach on the agreement of the parties and in particular situations of historical anomaly, or in light of the history of a particular sector, acceding to requests for classification-specific bargaining units in some cases. As well, where the applicant has been able to show difficulties with access to bargaining, particularly in situations where the respondent was in effect asking the union to organize more than one work site, the Board has balanced the interests of the parties, given particular weight to the organizing interests of the employees and certified unusual bargaining units. However, it has never done so lightly, or without a particular reason to do so.

(See also the comments of the Board, citing these two cases, in *Public Service Alliance of Canada*, unreported decision dated July 12, 1995, Board file 0793-95-R) [now reported at [1995] OLRB Rep. July 1010].

54. It also seems clear that the issues respecting fragmentation will be different where the bargaining unit proposed carves out a portion of the employees at a single workplace, than where there are a number of locations operated by a single employer. Indeed, many of the Board's recent decisions on bargaining unit configuration, including some of those cited by the parties, have been

concerned with the organization of single locations of multiple location retailers. In these circumstances, where the locations are reasonably autonomous of each other, and having regard to the issues around impediments to organizing where there are more than one workplace, and in the retail sector generally, the Board has been more inclined to tolerate a certain degree of fragmentation in order to facilitate access to collective bargaining.

- 55. It seems logical, however, that the Board would be more cautious with respect to the potential for fragmentation where there is a single workplace This approach was accepted by the Board in *Canadian Tire Petroleum*, [1994] OLRB Rep. April 360, at paragraphs 16, 17 and 18, and is referenced in the quote above from *Sifton Properties Limited*, *supra*.
- 56. Applying these considerations to the present case, it seems clear that the unit proposed by the applicant is not appropriate.
- 57. While the bargaining unit description sought by the applicant is framed in "all-employee" language, when the exclusions are considered it becomes in fact a unit made up of employees in only two classifications, drivers and driver helpers. Indeed, most of the employees in the applicant's proposed unit, 29 out of 31, are drivers. For this reason, the unit proposed by the applicant runs afoul of the Board's normal aversion to classification or departmental units.
- 58. To the extent that community of interest is considered, it is not particularly helpful to either party. A review of the facts summarized above shows that, while the drivers and driver helpers clearly share a community of interest, they also share one with the warehouse staff. These employees have much more in common than not, and the differences highlighted by the union could easily be accommodated in the process of collective bargaining. Indeed, as the central distinction between the employees in the two units proposed is in the fact of driving being performed, and all that goes with that in terms of skills, job duties, remuneration and benefits, scheduling, etc., it is arguable that the driver helpers and the warehouse staff have a greater community of interest than either share with the drivers.
- 59. It is also helpful to consider the combination of drivers and warehouse employees that is proposed by the responding party in the context of the Board's usual approach to including drivers in production units. Here, the whole focus of the operations of PFS Canada is on the distribution of goods, rather than on production, so all the employees are engaged in the same endeavour to a much greater degree than drivers would generally be connected to the production of goods.
- 60. While drivers and driver helpers spend much of their time out of the workplace, they are assigned out of and report back to a single location, so the factors relating to multiple location employers do not apply here. In addition, PFS Canada employs a relatively small workforce, which may exacerbate the effects of fragmentation.
- 61. As well, there is no claim in the present case, and neither would it be plausible to assert, that there were or are impediments to organizing the warehouse employees at PFS Canada.
- 62. Finally, we are satisfied that the classic problems caused by fragmentation in a single workplace are potentially serious problems here, and not mere inconvenience. These problems include the increased likelihood of strikes and other difficulties relating to work stoppages including the identification of bargaining unit work, the creation of seniority enclaves, the triggering of jurisdictional disputes, and the expense of administering several collective agreements.
- 63. For all of these reasons, we have concluded that the bargaining unit proposed by the applicant is not appropriate for collective bargaining purposes.

- 64. The unit proposed by the responding party would be an appropriate one. Having regard to our comments above concerning community of interest, we reject the argument of the applicant that the larger group of drivers, driver helpers, and warehouse employees would not be viable.
- 65. It appears that the applicant had at the time of the application for certification sufficient support in the larger unit to merit the ordering of a vote pursuant to section 8(2) of the Act.
- 66. Given that the larger unit was not the unit applied for, however, we will not direct the ordering of a vote in that unit unless we are advised by the applicant that that is its wish within 30 days of the date of this decision.
- 67. If no such request is forthcoming, the application will be dismissed.

2907-94-R United Food and Commercial Workers International Union Local 175, Applicant v. **Zellers Inc.**, Woolworth Canada Inc., Responding Parties

Sale of a Business - Woolworth terminating lease in shopping mall - Shopping mall pursuing Zellers as new tenant - Zellers and shopping mall negotiating new lease and expanding store - With exception of premises and five employees, nothing of Woolworth's ending up in hands of Zellers - Union's application alleging sale of business by Woolworth to Zellers dismissed

BEFORE: Kevin Whitaker, Vice-Chair, and Board Members S. C. Laing and Pauline R. Seville.

APPEARANCES: Kelvin Kucey for the applicant; Wallace Kenny, Frank McGurk and Linda Hunter for Zellers Inc.; no one appearing for Woolworth Canada Inc.

DECISION OF THE BOARD; August 17, 1995

What this case is about

- 1. This is an application under section 64 of the *Labour Relations Act*. The applicant seeks a declaration that the respondent Zellers Inc. (referred to in this decision as "Zellers") is bound by the collective agreement between the applicant and the respondent Woolworth Canada Inc. (referred to in this decision as "Woolworth").
- 2. The substance of the case is that Woolworth who had a collective agreement with the applicant, terminated a lease in a shopping mall in a small regional centre. The landlord of the mall who has had an ongoing business relationship with Zellers, pursued Zellers as a new tenant. Zellers and the landlord negotiated a new lease and expanded the store. With the exception of the premises and five employees, nothing of Woolworth's ended up in the hands of Zellers. There were no direct or indirect dealings between Zellers and Woolworth around the transaction. For reasons which follow, this application is dismissed.

The Facts

3. The facts are not in dispute. Woolworth did not appear. Zellers called as its principal witness Frank McGurk ("McGurk"), Director of Real Estate and Development for both Zellers and "The Bay". The applicant called as its only witness Antoinette Ferguson, a litigation clerk

employed by Woolworth. The applicant did not call any evidence to contradict the evidence of McGurk. Credibility is not an issue.

- 4. Woolworth has for a number of decades, operated what has been described in the evidence as a "junior department store" at 500 Railway Street in Kenora. The store has most recently operated under the name "Woolco". Until it closed, Woolco was the only department store in the Kenora area. The store was located in a mall owned by First Commercial Management Inc. (referred to in this decision as "Commercial"). The principal of Commercial is Thaddeaus L. Charne, Q.C. ("Charne").
- 5. In 1984, the applicant was certified as the bargaining agent for all employees of Woolworth at 500 Railway Street in Kenora. During the last round of collective bargaining, the applicant became aware of the fact that the Woolco store in Kenora would be closed. The applicant and Woolworth concluded their collective bargaining. They reached an agreement concerning the payment of severance to the employees working at 500 Railway Street in Kenora. The agreement also confirmed Woolworth's commitment to encourage any new retailer who might occupy the premises in Kenora to hire former Woolworth employees.
- 6. In January of 1994, Charne on behalf of Commercial contacted McGurk. The purpose of the contact was to solicit Zellers as a prospective tenant for the site occupied by Woolworth. The Woolco store was scheduled to close in 1994 and Commercial wanted to obtain a new tenant as quickly as possible.
- 7. Zellers and Commercial negotiated the terms of a lease between January and May of 1994. The lease was different from the one that had existed between Woolworth and Commercial. McGurk testified that neither Zellers nor Commercial wanted the old lease between Woolworth and Commercial to continue. Both Zellers and Woolworth have standard form leases which vary in a number of ways. McGurk testified that the Woolworth lease would not allow Zellers to meet their objectives. In his view, Commercial might be "slightly better off" with the Zellers lease.
- 8. According to McGurk, Woolworth ceased operations in April of 1994. Zellers took possession of the premises in late July or early August of 1994. Zellers assumed the tenancy in what was described by McGurk as "broomswept clean". This means that the space was empty of all merchandise, fixtures or moveables and was literally broom swept.
- 9. It was McGurk's uncontradicted evidence that there were no dealings either directly or indirectly between Zellers and Woolworth concerning the disposition of the tenancy by Woolworth. Woolworth did not receive any compensation or consideration from Zellers for relinquishing the tenancy. There was no evidence to suggest that Woolworth profited at all by abandoning the lease with Commercial. There was however some evidence that Zellers and Woolworth had directly negotiated a departure by Woolworth at the behest of Zellers in another mall in another province. In that situation, McGurk stated that unless Zellers paid Woolworth some money, the latter would not leave the tenancy. This situation was contrasted with the dealings between the parties concerning the Kenora location. In Kenora, Woolworth had make a unilateral decision to leave without regard to what might happen to the vacated premises.
- 10. Between July of 1994 and the spring of 1995, Zellers undertook a major renovation and expansion of the premises in Kenora. Approximately 5.3 million dollars was spent. The floor space was expanded by over a third from 55,000 to 74,350 square feet. Zellers built new walls, ceilings and roof. New lighting, electrical, mechanical and heating and air conditioning systems were installed. New furnishings, fixtures and merchandise were procured in keeping with Zellers guidelines in place throughout its approximately 300 stores nation-wide.

- Before opening, Zellers hired approximately 100 employees. The employees were hired directly from the local community without any involvement on the part of Woolworth. Approximately 5 employees who had formerly worked for Woolworth were hired by Zellers. Former Woolworth employees were not given preference, and all applicants were assessed on their own merits according to standards adopted by Zellers nation-wide.
- 12. Zellers opened its doors to the public in Kenora in November of 1994. This opening predated the expansion of the floor space which did not occur until the spring of 1995. McGurk testified that both Zellers and Commercial could not afford to miss the winter holiday sales period when 60 to 80 per cent of yearly sales would normally be done.
- McGurk was asked questions by both Counsel concerning the value to Zellers of the location in Kenora, and the goodwill that might have passed from Woolworth to Zellers as a result of occupying the same premises. In McGurk's view, Zellers would have done just as well in Kenora at any other location as long as there was parking, visibility and street access. He stated that the specific location was of no value to Zellers and they could have built a free standing store that would have done just as well as long as it had parking, visibility and street access. McGurk also stated that there would be no goodwill passing through to Zellers from Woolworth. He emphasized the distinctions between the way in which the two companies do business and the fact that Zellers has a distinctive way of marketing itself nation-wide. McGurk did however concede that both Zellers and Woolco carried on the same type of business, and that the work done by employees on a day to day basis would be the same for the two companies.
- 14. Counsel for the applicant spent much of his cross examination exploring the relationship between Zellers and Charne. It was conceded by Zellers that there was a close business relationship between Charne and Zellers and that they had entered into a joint venture whereby they each owned a half interest in a mall in another province. It was also the case that Charne was a landlord for Zellers in at least five other properties. McGurk testified that Zellers had close relationships with a number of other landlords, and that with 300 stores in the country, there were other landlords with as many as 19 leases with Zellers. McGurk said that in the past, Zellers had owned property jointly with other landlords although in the nine years in his present position, the joint venture with Charne was the first of this type that he had been involved in. McGurk was clear however, that throughout the negotiations over the Kenora property, Charne acted in his own interest as would any other prospective landlord.

Analysis

- 15. The threshold question to be determined is whether there was a sale of a business. The Act defines the terms "business" and "sale" broadly so as to include entities and transactions which bear little resemblance to their counterparts at common law. As the Board has noted in many cases, the purpose of these broad categories is to ensure that the integrity of the collective bargaining process is not undermined by changes in the form of the enterprise. Having said that however, it is also clear that the two categories have their limits. "Sale" does not include all transfers or dispositions, nor does the term "business" refer to all undertakings or forms of production.
- 16. In Accomodex Franchise Management, [1993] OLRB Rep. April 281, the Board stated that a "business" is a commercial vehicle rationally constructed to produce certain goods or services for a defined market. In St. Leonard's Society of Metropolitan Toronto, [1993] OLRB Rep. Jan. 56, the Board described its conception of "business", as an instrumental one as opposed to a functional one. Put plainly, this means that the business consists of various components such as employees, assets, body of work etc. and the relationships that exist between the constituent components. This instrumental formulation of "business" is contrasted with what has been described in

the jurisprudence as the "functional" formulation, referring only to the purpose of the business or the the work itself which is performed. Support for this distinction is drawn from the Supreme Court of Canada in *Syndicat national des employes de la Commission scolaire regionale ed l'outaouais (CSN) v. Union des employes de service local 298 (FTQ), Bibeault et al.* [1988] 2 SCR 1048. Relying on the same authority, the Board has observed in *Parnell Foods Limited* [1992] OLRB Rep. Dec 1164, that the instrumental as opposed to the functional approach has now been adopted in all Canadian jurisdictions.

- 17. The significance of the Board's adoption of an instrumental analysis is that the applicant must demonstrate that something more has been disposed of from the predecessor to the successor employer than simply the function of performing the same work. The applicant must go further and prove that an operational entity consisting of constituent components and particular relationships between those components has passed from predecessor to successor employer. There are of course varying degrees to which this may occur and the term "business" in section 64(1) is defined to include one or more parts of a business. As the Board noted in *Accomodex* at paragraph 58, the more the successor employer's ability to carry on business is derived or is dependent upon things which were acquired from the predecessor employer, the more likely a transfer of a business has taken place.
- 18. The applicant relied on a number of Board decisions dealing with the retail food industry. It argued that this industry was analogous to the department store industry and for that reason, the same set of assumptions applied in those cases should be applied in this case. There are a number of cases dealing with the retail food industry where the Board has found that the elements of store location and premises were such a fundamental aspect of the predecessor employer's business that a disposition of those assets determined a sale of a business. In *Dutch Boy Food Markets*, 65 CLLC 16,051, the Board stated:

The success of a food supermarket is dependent, on large measure, upon the support of the people who live in the area in which the store is located. Accordingly, any goodwill consists in the habit of customers of the vendor continuing to patronize the food market located on the same premises.

- 19. The remarks in *Dutch Boy* referred to above have been relied on in a number of subsequent Board cases dealing with the retail food industry (see for example *More Groceteria Limited*, [1980] OLRB Rep. April 486, and *Canada Safeway Limited*, [1986] OLRB Rep. November 1498). In each case however, the Board made a finding of fact that the specific location of the business was an integral component of the predecessor business.
- 20. In the case before us, the only aspect of Woolworth's business which made its way into the hands of Zellers, was the physical location of the premises. The premises were however occupied under a lease with terms that varied from the lease that had existed between Commercial and Woolworth. It was also the case that Zellers virtually rebuilt the space and expanded it by over a third. Significantly, none of the merchandise, inventory, fixtures or furnishings belonging to Woolworth passed to Zellers. Very few former Woolworth employees ended up working for Zellers. Those that did had to compete for positions as any other new hires would have, with no advantage gained from the fact that they had formerly worked for Woolworth.
- On the issue of the significance of the particular location to Zellers' business, we have only the uncontradicted evidence of McGurk. He testified that the specific location was of no value to Zellers. As long as they had parking, road access and visibility, they could have done as well in any location in the Kenora area. This assertion was not challenged by the union and no evidence was lead to the contrary.

- Where the only tangible thing disposed of by the predecessor employer is the location, the significance of the location for the successor employer is of central importance. In a small regional centre where the successor will have no local competition, McGurk's evidence in this regard makes intuitive sense. If a consumer in Kenora wishes to patronize a department store, that consumer will presumably go to wherever the one department store is located. The same reasoning might not apply in a larger centre where a number of malls exist, each with their own department store tenant competing for business in the same geographic market. In those circumstances, consumers may be drawn to a particular geographic location and the retail food store assumptions might make more sense.
- On the evidence before us, we cannot find as a fact that the specific location of the business was an important or critical element of either Woolworth's or Zellers business. On a similar set of facts in a case dealing with the same parties in British Columbia, the Board there came to the same conclusion. (F.W. Woolworth Co. Limited-F.W. Woolworth CIE Limitee and Zellers Inc. and United Food and Commercial Workers International Union Local 1518 unreported decision of the British Columbia Labour Relations Board BCLRL No. B231/95 dated June 16, 1995).
- 24. The applicant also argued that the transaction was less than arms length because of the close business relationship that existed between Zellers and Commercial. The applicant suggested that Commercial in effect acted as an agent for Zellers in its dealings with Woolworth. We find that on the evidence, Commercial acted in its own interest as would any other owner of retail mall property. There is little doubt that the interests of Commercial and Zellers would overlap, but again it would appear that in any commercial tenancy agreement, the landlord would presumably wish to have a successful tenant to safeguard the landlord's interest in the tenancy. McGurk testified on this point that although his relationship with Charne was a close business relationship, it also was the case that Zellers had a number of similar relationships with other landlords. Certainly there were landlords who held more Zellers stores properties than Commercial. On the facts, we cannot find that Charne or Commercial were acting as agents of Zellers in dealing with Woolworth. In fact, it would appear that Woolworth unilaterally decided to discontinue its business in Kenora. Whatever negotiations took place following that decision between Woolworth and Commercial did nothing to alter that very fundamental decision.
- 25. Accordingly, the Board finds that in the circumstances of this application, a sale of a business did not take place within the meaning of the Act. For this reason, the application is dismissed.

COURT PROCEEDINGS

1761-88-OH; 1563-89-U (Court File No. M10756) Jill Bettes, Applicant v. Boeing Canada/de Havilland Division and Susan A. Tacon, John A. Ronson and David A. Patterson and Ontario Labour Relations Board, Respondents

Health and Safety - Judicial Review - Employee citing second-hand tobacco smoke in work refusal - Board finding health and safety not real reason for refusal and that employer discipline not unlawful in circumstances - Complaint dismissed - Employee seeking judicial review on ground that members' conduct give rise to reasonable apprehension of bias - Employee issuing summons to witness to Board member to secure evidence for use in judicial review application - Motions court judge concluding that summons an abuse of process and quashing it - Three-judge panel of Divisional Court upholding decision of motions judge and dismissing motion to set decision aside - Leave to appeal to Court of Appeal denied

Board decision reported at [1990] OLRB Rep. Dec. 1213. Motions court decision reported at [1992] OLRB Rep. Oct. 1136; 10 O.R. (3d) 768. Divisional Court decision reported at [1993] OLRB Rep. March 275.

Court of Appeal for Ontario, Robins, Osborne and Laskin JJ.A., August 29, 1995.

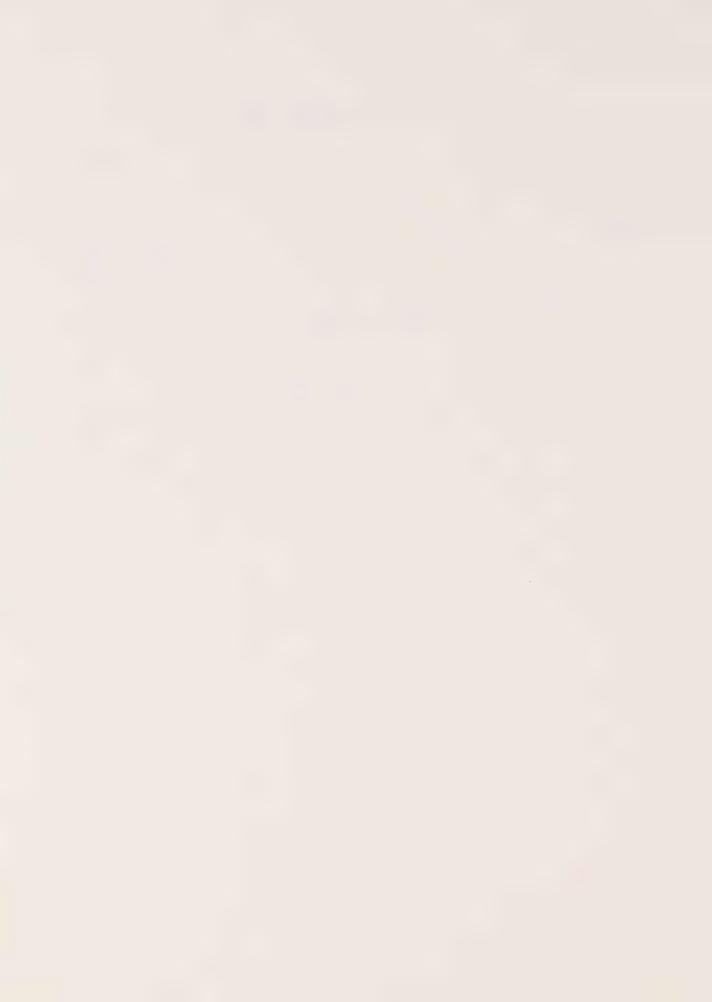
Robins J.A. (endorsement): Application for leave to appeal is dismissed with costs.





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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1309-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Patrick P. Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of Patrick P. Construction Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

4059-94-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Windsor Painting Contractors (1986) Limited and Hastings County General Contractors Ltd. (Respondents)

Unit: "all painters and painters' apprentices employed by Windsor Painting Contractors (1986) Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and all painters and painters' apprentices employed by Windsor Painting Contractors (1986) Limited in all other sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0170-95-R: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. G.B. Mecanique Ltée (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of G.B. Mecanique Ltée in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of G.B. Mecanique Ltée in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0349-95-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Fort William Clinic (Respondent)

Unit: "all employees of Fort William Clinic in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, physicians and student physicians" (50 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0476-95-R: Teamsters Local Union 938 (Applicant) v. J.E. Martel & Son Lumber Ltd. (Respondent)

Unit: "all employees of J.E. Martel & Son Lumber Ltd. working in and out of the Town of Chapleau, save and except supervisors, persons above the rank of supervisor, and office, clerical and sales staff" (80 employees in unit) (Having regard to the agreement of the parties)

0513-95-R: IWA-Canada, Local 2693 (Applicant) v. Hill's Greenhouses Ltd. (Respondent) v. Louise Myllyaho (Intervener)

Unit: "all employees of Hill's Greenhouses Ltd. in the Municipality of Oliver, save and except manager, supervisors, Office and Sales Staff and persons above the rank of Supervisor" (13 employees in unit)

0565-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Tera North Construction & Engineering Limited (Respondent)

Unit: "all employees of the responding party in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, truck drivers, labourers and form builders in the employ of Tera North Construction & Engineering Limited in the Township of Foley and the adjacent Townships of Archipelago, Cowper, Conger, Humphrey, Christie, McKellar, McDougall and Carling, and the Township of Christie and the adjacent Townships of Foley, Conger, Humphrey, Cardell, Monteith, Spence, McKellar and McDougall, in the Districts of Parry Sound and Muskoka and in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0694-95-R: United Steelworkers of America (Applicant) v. Ajax Precision Manufacturing Limited c.o.b. as Triton Division, Ajax Precision Manufacturing Ltd. (Respondent)

Unit: "all employees of Ajax Precision Manufacturing Limited c.o.b. as Triton Division, Ajax Precision Manufacturing Ltd. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (72 employees in unit) (Having regard to the agreement of the parties)

0738-95-R: United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Dynatec Mining Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Dynatec Mining Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Dynatec Mining Limited in all sectors of the construction industry other than the industrial, commercial and institutional sector, in the Township of MacMillan and the adjacent Townships of Mulloy, Fintry, Auden, Gill, Arnott, Storey, McCoig and Cross; save and except nonworking foremen and persons above the rank of non-working foreman" (5 employees in unit)

0798-95-R: International Union of Operating Engineers, Local 796 (Applicant) v. Soulard Janitorial Management Services Limited (Respondent)

Unit: "all employees of Soulard Janitorial Management Services Limited regularly employed for not more than 24 hours per week at the Ottawa General Hospital in the City of Ottawa, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of May 19, 1995" (61 employees in unit) (Having regard to the agreement of the parties)

0835-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 447965 Ontario Limited carrying on business as Comfort Inn by Journey's End, (Respondent)

Unit: "all employees of 447965 Ontario Limited c.o.b. Comfort Inn by Journey's End in the City of Burlington, save and except Assistant Manager, persons above the rank of Assistant Manager, and full-time night auditors" (19 employees in unit) (Having regard to the agreement of the parties)

0945-95-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Canadian BBR (1980) Inc. (Respondent)

Unit: "all rodmen and rodmen apprentices, in the employ of Canadian BBR (1980) Inc. in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

0995-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Downsview Plumbing & Heating Company Limited (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Downsview Plumbing & Heating Company Limited in the industrial, commercial and institutional sector of

the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Downsview Plumbing & Heating Company Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, and the low-rise portion of the residential sector, save and except non-working foremen and persons above the rank of non-working foreman' (4 employees in unit) (Clarity Note)

1018-95-R: International Union of Bricklayers and Allied Craftsmen Local #20 Ontario (Applicant) v. Centre Leasehold Improvements Limited (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Centre Leasehold Improvements Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Centre Leasehold Improvements Limited in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1069-95-R: Canadian Union of Public Employees (Applicant) v. Victorian Order of Nurses - Algoma Branch (Respondent)

Unit: "all office and clerical employees of the Victorian Order of Nurses - Algoma Branch, in the District of Algoma, save and except Managers, persons above the rank of Manager, Administrative Assistant to the Executive Director, Payroll/Human Resource Assistant, persons employed pursuant to a government-sponsored work program or student co-operative program" (14 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1071-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. St. Augustine's Seminary of Toronto (Respondent)

Unit: "all employees of St. Augustine's Seminary of Toronto in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, teaching staff, kitchen staff, housekeeping staff, office and clerical staff and employees regularly employed for not more than 24 hours per week" (6 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1133-95-R: Canadian Union of Public Employees (Applicant) v. Muskoka Youth Counselling Centre (Respondent)

Unit: "all employees of Muskoka Youth Counselling Centre in the District Municipality of Muskoka, save and except Supervisors, persons above the rank of Supervisor and Administrative Secretary" (13 employees in unit) (Having regard to the agreement of the parties)

1144-95-R: Morgan-Provincial Employees' Association (Applicant) v. Morgan-Provincial of Canada Corporation (Respondent)

Unit: "all employees of Morgan-Provincial of Canada Corporation in the City of Niagara Falls, save and except forepersons/supervisors, persons above the rank of foreperson/supervisor, office and clerical staff" (20 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1149-95-R: Ontario Public Service Employees Union (Applicant) v. Community Living - North Frontenac (Respondent)

Unit: "all employees of Community Living - North Frontenac in the County of Frontenac, save and except Supervisors, persons above the rank of Supervisor, and Administrative Assistant" (21 employees in unit) (Having regard to the agreement of the parties)

1210-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: "all employees of Empire Maintenance Industries Inc. engaged in cleaning and maintenance at the Rothmans Building, 1500 Don Mills Road, in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, office and clerical staff" (7 employees in unit) (Having regard to the agreement of the parties)

1229-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Law Development Group (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Law Development Group in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Law Development Group in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1249-95-R: United Steelworkers of America (Applicant) v. LMH Hotel Operations Limited (Respondent)

Unit: "all office, clerical and sales staff of LMH Hotel Operations Limited c.o.b. as Ramada Hotel 400/401 in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager, Controller, Auditor, Night Auditor, Catering Manager, Banquet Manager, Human Resources Manager, Sales Director, Sales Co-ordinator, and those persons for whom any trade union held bargaining rights as of June 26, 1995" (6 employees in unit) (Having regard to the agreement of the parties)

1259-95-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Public Utilities Commission of the City of Sault Ste. Marie (Respondent)

Unit: "all office employees of The Public Utilities Commission of the City of Sault Ste. Marie" (39 employees in unit) (Having regard to the agreement of the parties)

1260-95-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Public Utilities Commission of the City of Sault Ste. Marie (Respondent)

Unit: "all employees of The Public Utilities Commission of the City of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, and office staff" (62 employees in unit) (Having regard to the agreement of the parties)

1265-95-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Bay Bloor Executive Suites (Respondent)

Unit: "all employees of Bay Bloor Executive Suites employed at 1101 Bay Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales, front desk staff and the superintendent" (18 employees in unit) (Having regard to the agreement of the parties)

1310-95-R: United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Darand Enterprises Ltd. (Respondent)

Unit: "all journeymen and apprentice carpenters other than millwrights in the employ of Darand Enterprises Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice carpenters other than millwrights in the employ of Darand Enterprises Ltd. in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1313-95-R: Ontario Public Service Employees Union (Applicant) v. Hotel-Dieu Grace Hospital (Respondent)

Unit: "all employees of the Hotel-Dieu Grace Hospital in the City of Windsor, employed in its Respiratory Therapy Department as Respiratory Therapists (Registered and Non-Registered) and Charge Respiratory Therapists, save and except Supervisors, persons above the rank of Supervisor, Instructors, office and clerical staff and students in training" (16 employees in unit) (Having regard to the agreement of the parties)

1334-95-R: Graphic Communications International Union Local 517M (Applicant) v. The Aylmer Express Limited (Respondent)

Unit: "all employees of The Aylmer Express Limited in the Town of Aylmer, save and except foremen and persons above the rank of foreman" (32 employees in unit) (Having regard to the agreement of the parties)

1340-95-R: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Hospital (Respondent)

Unit: "all lay registered and non registered medical laboratory technologists, registered and non registered medical radiation technologists, registered and non registered ultrasound technologists, registered and non registered respiratory therapists, registered and non registered E.C.G. technicians, vascular technicians and Phlebotomists, employed by St. Joseph's Hospital in the City of Guelph, save and except supervisors, persons above the rank of supervisor, students employed in a co-operative training program, students in training, and persons in bargaining units for which any trade union held bargaining rights as of June 29, 1995" (36 employees in unit) (Having regard to the agreement of the parties)

1342-95-R: Ontario Public Service Employees Union (Applicant) v. Saint Monica House (Respondent)

Unit: "all employees of Saint Monica House in the Regional Municipality of Waterloo, save and except Supervisors, persons above the rank of Supervisor, Chaplain and Human Resources Assistant" (18 employees in unit) (Having regard to the agreement of the parties)

1381-95-R: Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of Ottawa-Carleton (Respondent)

Unit: "all employees of The Children's Aid Society of Ottawa-Carleton in the Regional Municipality of Ottawa-Carleton, who are entitled to practice law in Ontario and are employed in their professional legal capacity, save and except Director of Legal Services and persons above the rank of Director of Legal Services" (5 employees in unit) (Having regard to the agreement of the parties)

1393-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Crystal Maintenance Contractors Limited (Respondent)

Unit: "all employees of Crystal Maintenance Contractors Limited at 311 Jarvis Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (7 employees in unit) (Having regard to the agreement of the parties)

1472-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. John Bear Pontiac-Buick Cadillac Ltd. (Respondent)

Unit: "all employees of John Bear Pontiac-Buick Cadillac Ltd. in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, tower operators and service advisors" (43 employees in unit) (Having regard to the agreement of the parties)

1509-95-R: IWA-Canada (Applicant) v. Scott's Plains Recycling Inc. (Respondent)

Unit: "all employees of Scott's Plains Recycling Inc. in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, office, clerical and administration staff, persons employed pursuant to a government sponsored training/ rehabilitation program, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (12 employees in unit) (Having regard to the agreement of the parties)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0079-95-R: Canadian Lear Workers' Union (Applicant) v. Lear Seating Canada Limited (Respondent) v. Amalgamated Clothing and Textile Workers Union, Local 1719 (Intervener)

Unit: "all employees of Lear Seating Canada Limited in Ajax, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff" (500 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	500
Number of persons who cast ballots	428
Number of ballots marked in favour of applicant	407
Number of ballots marked in favour of intervener	21

0480-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. The Cadillac Fairview Corporation Limited at the Toronto-Dominion Centre (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all non-probationary employees of The Cadillac Fairview Corporation Limited at the Toronto-Dominion Centre, in the Municipality of Metropolitan Toronto, save and except supervisors and those above the rank of supervisor, control technologist, office and clerical staff, employees in a bargaining unit for which any trade union held bargaining rights as of May 2, 1995, students employed during the school vacation period and employees employed for 24 hours per week or less" (55 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear or	1
voter's list	37
Number of ballots marked in favour of applicant	30
Number of ballots marked in favour of intervener	7

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0597-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Hy-Test Ready Mix (1988) Ltd., BFD Concrete Limited, Greenleaves (Respondents)

Unit: "all construction labourers in the employ of Hy-Test Ready Mix (1988) Ltd., BFD Concrete Limited and Greenleaves in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Hy-Test Ready Mix (1988) Ltd., BFD Concrete Limited and Greenleaves in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

0060-95-R: United Steelworkers of America (Applicant) v. Humber Sheet Metal Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Humber Sheet Metal Limited in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and engineers employed in their professional capacity" (120 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	128
Number of persons who cast ballots	123
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	123
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	61
Number of ballots segregated and not counted	0

0150-95-R: Ontario Nurses' Association (Applicant) v. Brant County Board of Health (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Brant County Board of Health in the City of Brantford, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary to Medical Officer of Health, Executive Assistant to Director of Home Care, Personnel Secretary to Employment Relations Officer, persons for whom any trade union held bargaining rights as of April 10, 1995" (74 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	74
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	69
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	31
Number of ballots segregated and not counted	2

0195-95-R: Nekison Employees Association (Applicant) v. Nekison Engineering & Contractors Ltd. (Respondent) v. Ontario Pipe Trades Council (Intervener)

Unit: "all journeymen plumbers and steamfitters and plumbers and steamfitters' apprentices in the employ of Nekison Engineering & Contractors Ltd., in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (34 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	27
Number of ballots marked in favour of applicant	16
Number of ballots marked in favour of intervener	9
Number of ballots marked in favour of second intervener	2

0357-95-R: Ontario Public Service Employees Union (Applicant) v. North Halton Association for the Developmentally Handicapped (Respondent)

Unit: "all employees of North Halton Association for the Developmentally Handicapped in the Regional Municipality of Halton, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (92 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	130
Number of persons who cast ballots	75
Number of ballots excluding segregated ballots cast by persons whose names appear of	n
voter's list	74
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	1

0496-95-R: L'Association des Enseignantes et des Enseignants franco-ontariens (Applicant) v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell (Respondent)

Unit: "Les enseignantes et les enseignants suppléants qualifiés à l'emploi du Conseil des écoles séparées catholiques de langue française de Prescott-Russell dans ses écoles élémentaires o le français est la langue d'enseignement en confirmité avec la partie XII de la loi sur l'éducation" (217 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	217
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	60
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	57
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

0710-95-R: Local 2228 International Brotherhood of Electrical Workers (Applicant) v. Imperial Parking Ltd. d.b.a. Citipark (Respondent) v. Hospitality & Service Trades Union Local 261 (Intervener)

Unit: "all employees of Imperial Parking Ltd. d.b.a. Citipark in the City of Ottawa, save and except supervisors and auditors, persons above the rank of supervisor and auditor and office and clerical staff" (72 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	56
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	54
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	44
Number of ballots marked in favour of intervener	9
Number of ballots segregated and not counted	2

0719-95-R: Teamsters Local Union 938 (Applicant) v. Corundol Environmental Ltd. (Respondent)

Unit: "all employees of Corundol Environmental Ltd. at 55 Vulcan Street, Rexdale in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, drivers, sales, technical, office and clerical staff" (20 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	18
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	7

Applications for Certification Dismissed Without Vote

0954-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. D.D. Masonry Contracting Inc. (Division of 765408 Ontario Inc.) (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario, Bricklayers, Masons Independent Union of Canada, Local 1, Masonry Contractors Association of Toronto (Interveners)

1051-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. 544375 Ontario Ltd./Avelino Masonry Ltd. (Respondent)

1112-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Kasanova Masonry Ltd. (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario, Masonry Contractors Association of Toronto, Bricklayers, Masons Independent Union of Canada Local 1 (Interveners)

3912-94-R; **3913-94-R**: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Dare Personnel Inc. (Respondent); International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 1092009 Ontario Inc. c.o.b. as Personnel Force (Respondent)

4332-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. International Language Centre (Respondent)

0793-95-R: Negotiations and Research Employees Union (Applicant) v. Public Service Alliance of Canada (Respondent) v. Alliance Employees' Union (Intervener)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0411-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. C.F.M. Inc. (Respondent)

Unit #1: "all employees of C.F.M. Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and professional engineers" (135 employees in unit)

0566-95-R: International Association of Machinists and Aerospace Workers (Applicant) v. Manchester Tank Canada Limited (Respondent)

Unit #1: "all employees of Manchester Tank Canada Limited located in the Town of Tillsonburg save and except supervisors, persons above the rank of supervisor." (89 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	92
Number of persons who cast ballots	89
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	85
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	67
Number of ballots segregated and not counted	4

0908-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Empire Maintenance Industries Inc. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit #1: "all employees of Empire Maintenance Industries Inc. at B.C.E. Place at 161 Bay Street and 181 Bay Street in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons

above the rank of non-working foreperson and students employed for the school vacation period" (110 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	119
Number of persons who cast ballots	86
Number of ballots excluding segregated ballots cast by persons whose na	ames appear on
voter's list	86
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	34
Number of ballots marked in favour of intervener	50

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3799-94-R: IWA - Canada (Applicant) v. Dynamic & Proto Circuits Inc. (Respondent)

Unit: "all employees of Dynamic & Proto Circuits Inc., 869 Barton Street in the City of Stoney Creek, save and except Supervisors, persons above the rank of Supervisor, office, clerical, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (85 employees in unit)

Number of names of persons on revised voters' list	79
Number of persons who cast ballots	83
Number of ballots, excluding segregated ballots, cast by persons whose names appear on	
voters' list	77
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	57
Ballots segregated and not counted	6

3920-94-R: Labourers' International Union of North America, Local 506 (Applicant) v. Primo General Contracting Inc. (Respondent)

Unit: "all construction labourers in the employ of Primo General Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Primo General Contracting Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rack of non-working foreman." (6 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	2

4536-94-R: Labourers' International Union of North America, Local 527 (Applicant) v. Ottawa Concrete Flooring Co. Ltd./Ltée (Respondent) v. The Operative Plasterers and Cement Masons' International Association of the United States and Canada, Local 124 (Intervener)

Unit: "all construction labourers in the employ of Ottawa Concrete Flooring Co. Ltd./Ltée, including all working foremen, journeymen and apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foreman those above the rank of non-working foreman and those employees for whom bargaining rights are already held by the applicant and all construction labourers in the employ of Ottawa Concrete Flooring Co. Ltd./Ltée, including all working foremen, journeyman and apprentices cement masons and wat-

erproofers engaged in all sectors of the construction industry, except the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton, the Counties of Prescott, Russell Glengarry, Stormont, Dundas, Grenville, Lanard, Leeds, Frontenanc, Renfrew, Lennox and Addington, Hastings, Peterborough, Northumberland and Prince Edward, save and except non-working foremen those above the rank of non-working foreman and those employees for whom bargaining rights are already held by the applicant (13 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	7

0341-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Kohl & Frisch Limited (Respondent)

Unit: "all employees of Kohl & Frisch Limited in the City of Vaughan, save and except Warehouse Operations Manager and persons above the rank of Warehouse Operations Manager, office, clerical and sales staff, and pending resolution by the Board, excluding as well Supervisors and persons above the rank of Supervisor" (208 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	224
Number of persons who cast ballots	204
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	191
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	71
Number of ballots marked against applicant	118
Number of ballots segregated and not counted	11

0553-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Creative Building Maintenance Inc. (Respondent)

Unit: "all employees of Creative Building Maintenance Inc. engaged in cleaning and maintenance at 30 and 35 Charles Street West, Toronto, Ontario save and except supervisors and persons above the rank of supervisors, and office and sales staff" (5 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

Applications for Certification Withdrawn

0472-95-R: Christian Labour Association of Canada Construction Workers Local 150 (Applicant) v. Sand-Mark Sheetmetal Ltd. (Respondent)

0695-95-R: Canadian Union of Public Employees Local 79 (Applicant) v. The Corporation of the City of Toronto (Respondent)

1188-95-R: United Steelworkers of America (Applicant) v. J.M.P. Maintenance Ltd. (Respondent)

1285-95-R: United Food and Commercial Workers International Union (Applicant) v. Ryding - Regency Meat Packers Ltd. (Respondent)

- 1370-95-R: Amalgamated Transit Union, Local 1582 (Applicant) v. The Greater Niagara Transit Commission (Respondent)
- **1382-95-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Total Roadway Engineering Corporation (Respondent)
- **1424-95-R:** International Union of Bricklayers and Allied Craftsmen Local #2, Toronto, Barrie and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. Convia Construction Ltd. (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

- 1205-93-R; 4323-94-R: Teamsters Local Union 230 Affiliated with the International Brotherhood of Teamsters (Applicant) v. Permanent Lafarge, A Division of Lafarge Canada, Inc. (Respondent); Teamsters Local Union 230 Affiliated with the International Brotherhood of Teamsters (Applicant) v. Lafarge Canada Inc. (Respondent) (*Granted*)
- **0825-94-R:** Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Kitchener-Waterloo Record, A Division of Southam Inc. (Respondent) v. Record Mechanical Employees Association (Intervener) (*Granted*)
- **3273-94-R:** Graphic Communications International Union, Local 500M (Applicant) v. Metroland Printing, Publishing & Distributing Ltd. (Respondent) (*Granted*)
- 0042-95-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent) (Granted)
- 0345-95-R: Peterborough Typographical Union, Local 248 (Applicant) v. The Peterborough Examiner (Respondent) (Granted)
- **0696-95-R:** Canadian Union of Public Employees Local 79 (Applicant) v. The Corporation of the City of Toronto (Respondent) (*Withdrawn*)
- **0766-95-R:** Local 427 of the Retail, Wholesale and Department Store Union District Council of the United Food & Commercial Workers International Union (Applicant) v. National Grocers Co. Ltd. (Respondent) (*Granted*)
- **0812-95-R:** Ontario Public Service Employees Union (Applicant) v. St. Joseph's General Hospital Thunder Bay (Respondent) (*Granted*)
- **0838-95-R:** Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the City of Toronto (Respondent) (*Granted*)
- 1110-95-R: Soulard Janitorial Management Services Limited (Applicant) v. International Union of Operating Engineers, Local 796 (Respondent) (*Granted*)
- 1314-95-R: Ontario Public Service Employees Union (Applicant) v. Hotel-Dieu Grace Hospital (Respondent) (*Granted*)
- **1321-95-R:** Association of Law Officers of the Crown (Applicant) v. The Crown in Right of Ontario (Respondent) (*Withdrawn*)
- 1371-95-R: Amalgamated Transit Union, Local 1582 (Applicant) v. The Greater Niagara Transit Commission (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1110-94-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Battlefield Drywall Inc. and 737049 Ontario Ltd. c.o.b. as D'Luxe Drywall (1987) (Respondents) (Terminated)

1441-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Bran Electrical Contractors Limited, Torwest Electric Ltd. and Nuway Electronic Ltd. (Respondent) (*Dismissed*)

3370-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 (Applicant) v. 313634 Ontario Limited (formerly Vout Welding and Fabricating Limited) and Vout Welding and Fabricating Limited (formerly 564731 Ontario Limited) (Respondents) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Intervener) (*Endorsed Settlement*)

3657-94-R: United Brotherhood of Carpenters and Joiners of America, Local 93, United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicants) v. R.J. Nicol Construction Limited, 1043167 Ontario Limited carrying on business as Crossford Construction (Respondents) (*Granted*)

3883-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Turn-Key Installations Incorporated and Align Construction & Development Inc. (Respondents) (*Withdrawn*)

3962-94-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Windsor Painting Contractors (1986) Limited and Hastings County General Contractors Ltd. (Respondents) (*Dismissed*)

4327-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1006571 Ontario Limited, Don Valley Storage Inc., Florian Kunst c.o.b. as Florian Management (Respondents) (*Withdrawn*)

4479-94-R: United Steelworkers of America (Applicant) v. Arko Textiles Inc., Leisure Treads Inc., Spidertex Inc. (Respondents) (*Withdrawn*)

0101-95-R: Communications, Energy and Paperworkers Union of Canada, Local 102-0 (OTU) (Applicant) v. Mutual/Hadwen Imaging Technologies Inc. (Respondent) v. Charles Gauthier, et al (Intervener) (*Dismissed*)

0306-95-R: United Brotherhood of Carpenters and Joiners of America, Local 93 United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. R.J. Nicol Construction Limited., R.J. Nicol (1975) Construction Limited., 1043167 Ontario Limited carrying on business as Crossford Construction (Respondents) (*Granted*)

0389-95-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. J.C.P. Painting & Associates and RCS Painting (Respondents) (*Endorsed Settlement*)

0517-95-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Andreynolds Company Limited, #772702 Ontario Inc., c.o.b. as Shaw's Pumps & Plumbing, Bill Bailey of Belleville Limited (Respondents) (*Withdrawn*)

0640-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Multitech Mechanical Contracting Inc. and Plantech Mechanical Contracting Inc. (Respondents) (*Withdrawn*)

0851-95-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Sys-

temes Interieurs Jean Bernard Enrg., Partitions Jean Bernard, Perfect Drywall Limited, Partitions Gatineau, 165902 Canada Inc. (Respondents) (Withdrawn)

0935-95-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. C & D Limited and G. Castle Construction Corporation (Respondents) (Withdrawn)

0961-95-R: The Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Honey Window & Plate Ltd., Windshield Pro Ltd. and Action Auto Glass Limited (Respondents) (*Endorsed Settlement*)

1365-95-R: Alzar Industries Inc. (Applicant) v. Alfin Aluminum Finishes Inc. (Respondent) (Withdrawn)

1373-95-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Merrick Plastering & Wall Systems Ltd., , Maximal Plastering & Wall Systems Limited (Respondents) (*Granted*)

SALE OF A BUSINESS

1110-94-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Battlefield Drywall Inc. and 737049 Ontario Ltd. c.o.b. as D'Luxe Drywall (1987) (Respondents) (*Terminated*)

1441-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Bran Electrical Contractors Limited, Torwest Electric Ltd. and Nuway Electronic Ltd. (Respondent) (*Granted*)

3370-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 (Applicant) v. 313634 Ontario Limited (formerly Vout Welding and Fabricating Limited) and Vout Welding and Fabricating Limited (formerly 564731 Ontario Limited), 1035559 Ontario Limited o/a Kent Industrial Services (Respondents) (*Endorsed Settlement*)

3657-94-R: United Brotherhood of Carpenters and Joiners of America, Local 93, United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicants) v. R.J. Nicol Construction Limited, 1043167 Ontario Limited carrying on business as Crossford Construction (Respondents) (*Granted*)

3883-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Turn-Key Installations Incorporated and Align Construction & Development Inc. (Respondents) (*Withdrawn*)

4327-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1006571 Ontario Limited, Don Valley Storage Inc., Florian Kunst c.o.b. as Florian Management (Respondents) (Withdrawn)

4593-94-R: Cashway Building Centres Inc. (Applicant) v. United Steelworkers of America, Local 414 Canadian Service Sector Division (Respondent) (*Granted*)

0101-95-R: Communications, Energy and Paperworkers Union of Canada, Local 102-0 (OTU) (Applicant) v. Mutual/Hadwen Imaging Technologies Inc. (Respondent) v. Charles Gauthier, et al (Intervener) (*Dismissed*)

0306-95-R: United Brotherhood of Carpenters and Joiners of America, Local 93 United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. R.J. Nicol Construction Limited, R.J. Nicol (1975) Construction Limited., 1043167 Ontario Limited carrying on business as Crossford Construction (Respondents) (*Granted*)

0389-95-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. J.C.P. Painting & Associates and RCS Painting (Respondents) (*Endorsed Settlement*)

0517-95-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Andreynolds Company Limited, #772702 Ontario Inc., c.o.b. as Shaw's Pumps & Plumbing, Bill Bailey of Belleville Limited (Respondents) (*Withdrawn*)

0640-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Multitech Mechanical Contracting Inc. and Plantech Mechanical Contracting Inc. (Respondents) (*Withdrawn*)

0851-95-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Systemes Interieurs Jean Bernard Enrg., Partitions Jean Bernard, Perfect Drywall Limited, Partitions Gatineau, 165902 Canada Inc. (Respondents) (*Withdrawn*)

0935-95-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. C & D Limited and G. Castle Construction Corporation (Respondents) (*Withdrawn*)

0961-95-R: The Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Honey Window & Plate Ltd., Windshield Pro Ltd. and Action Auto Glass Limited (Respondents) (*Endorsed Settlement*)

1373-95-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Merrick Plastering & Wall Systems Ltd., Maximal Plastering & Wall Systems Limited (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

4399-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173 (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Locals 105, 257, 357, 461, 467, 580, 582, & 634 and Famous Players Inc. and Cineplex Odeon Corporation et al (Respondents) (*Granted*)

1003-95-R: International Brotherhood of Painters and Allied Trades, Windsor Local 1494 (Applicant) v. Architectural Glass and Metal Contractors Association (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4343-94-R: Robert Woodbridge (Applicant) v. IWA-Canada, Local 2693 (Respondent) v. Taiga Trucking (Ontario) 1980 Inc. (Intervener)

Unit: "all employees of Taiga Trucking (Ontario) 1980 Inc. employed in and out of the District of Thunder Bay, save and except foremen, persons above the rank of foreman and mechanics" (15 employees in unit) (Granted)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names app	pear on
voter's list	13
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	12

4648-94-R: Mike Lindgren et al (Applicant) v. The International Brotherhood of Electrical Workers Local 353 (IBEW) (Respondent) (*Terminated*)

0166-95-R: Helen Brill, Debbie Hettrick (Applicants) v. United Food and Commercial Workers International Union, Local 1977 (Respondent) v. 913119 Ontario Ltd., c.o.b. as Burke's Food Market (Intervener)

Unit: "all employees of 913119 Ontario Ltd. in the Town of Southampton, save and except Department Managers, persons above the rank of Department Managers, office and clerical staff" (38 employees in unit) (Clarity Note) (Granted)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots 39 Number of ballots excluding segregated ballots of	cast
by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of respondent	13
Number of ballots marked against respondent	22
Number of ballots segregated and not counted	4

0194-95-R: Casey Maticiw (Applicant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union Number 172 Restoration Steeplejacks (Respondent) v. Hogan Contracting and Restoration, a Division of 1115451 Ontario Inc., The Steeplejack and Masonry Restoration Contractors Association (Interveners)

Unit: "all employees of Hogan Contracting and Restoration in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except those above the rank of working foremen" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

0224-95-R: Leanne Agnew et al (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Christie Brown & Co., Division of Nabisco Brands Ltd. (Intervener)

Unit: "all the office employees of Christie Brown & Co. at 1775 Sismet Road, Mississauga, Ontario, L4W 1P9, save and except the Office Manager and those above the rank of Office Manager and sales staff" (11 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	8

0225-95-R: Randy Russell (Applicant) v. International Brotherhood of Electrical Workers, Local 773 (Respondent) v. Honey Electric Limited (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of Honey Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all electricians and electricians' apprentices in the employ of Honey Electric Limited in all other sectors of the construction industry excluding the industrial, commercial and institutional sector in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) (Granted)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

0226-95-R: Randy Russell (Applicant) v. International Brotherhood of Electrical Workers, Local 773 (Respondent) v. Honey Electric Limited (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of Honey Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all electricians and electricians' apprentices in the employ of Honey Electric Limited in all other sectors of the construction industry excluding the industrial, commercial and institutional sector in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

0338-95-R: Peter Tsetsonis (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions 628, 508, 800, 552, 663, 593, 527, 666, 67, 599, 46, 221, 463, 71, and 819 (Respondents) v. Bruno Plumbing & Contracting Inc. (Intervener)

Unit: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices and welders in the employ of Bruno Plumbing & Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit) (*Granted*)

0358-95-R: Walter B. Samms (Applicant) v. Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and its affiliated Local 1916 (Respondent) v. Advance Installations (Intervener) (Dismissed)

Unit: "all millwrights and millwright apprentices in the employ of Advance Installations in the Province of Ontario in the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0445-95-R: Joshua Rose (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 785 (Respondent)

Unit: "all journeymen and apprentice carpenters, other than millwrights engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (6 employees in unit) (Withdrawn)

0490-95-R: Don Ellenor and Pete Booth (Applicant) v. The International Brotherhood of Painters and Allied Trades; The Ontario Council of the International Brotherhood of Painters and Allied Trades; The International Brotherhood of Painters and Allied Trades, Local 1590 (Respondent)

Unit: "all journeymen painters, apprentice painters, paperhangers, fabric hangers, decorators, sandblasters, water blasters, vacuum operators, swingstage men, foremen or sub-foremen in the employ of the Employer in the Province of Ontario" (2 employees in unit) (Dismissed)

0506-95-R: Warren Jenkins (Applicant) v. Service Employees International Union, (478) North Bay, Ontario (Respondent) v. Muskoka Board of Education (Intervener)

Unit: "all employees of The Muskoka Board of Education engaged in maintenance, service and plant operations, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office staff, students employed during the school vacation period and employees covered by a subsisting collective agreement between the parties" (24 employees in unit) (Dismissed)

0825-95-R: The Employees of Peninsula Plastics Ltd. (Applicant) v. The Glass, Molders, Pottery Plastics and Allied Workers International Union (Respondent) v. Peninsula Plastics Limited (Intervener)

Unit: "all employees of Peninsula Plastics Limited in the Town of Fort Erie, Ontario, save and except foreperson, persons above the rank of foreperson, office and sales staff" (17 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	17

1191-95-R: Kevin Keenan (Applicant) v. Office and Professional Employees International Union, Local 96 (Respondent) v. Canadian Shipbuilding and Engineering Ltd. c.o.b. Pascol Engineering (Intervener) (Granted)

1212-95-R: Heather Davis (Applicant) v. Canadian Union of Public Employees, Local 3689 (Respondent) (Withdrawn)

1361-95-R: Marlene Asselstine (Applicant) v. United Steelworkers of America (on behalf of its Local 7519-07) (Respondent) (Granted)

REFERRAL FROM MINISTER (SECTION 109)

4440-94-M: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 4355 (Applicant) v. Laidlaw Transit Ltd. (Respondent) (*Terminated*)

0522-95-M: Canadian Union of Public Employees, Local 2177 (Applicant) v. Laidlaw Transit Ltd. (Respondent) (Granted)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1616-95-U: Traugott Construction (Kitchener) Ltd. (Applicant) v. Bricklayers and Allied Craftsmen, Local 2, International Brotherhood of Electrical Workers Local 894, Bob Hill, Danilo Buttazzoni, Labourers' International Union of North America Local 506, United Brotherhood of Carpenters and Allied Workers Local 27 (Respondents) (Withdrawn)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

0959-95-U: Ontario Public Service Employees Union, Local 426 (Applicant) v. La Société de l'aide à l'enfance de Prescott-Russell, Prescott-Russell Children's Aid Society, and The Crown in Right of Ontario as represented by the Minister of Community and Social Services (Respondents) (*Terminated*)

1108-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Budget Car Rental Toronto Limited (Respondent) (*Terminated*)

1177-95-M: United Food and Commercial Workers Union, Local 175 (Applicant) v. Vermilion Bay Co-Operative (Respondent) (Withdrawn)

1374-95-U: United Rubber, Cork, Linoleum & Plastic Workers of America, Local 232 (Applicant) v. Goodyear Canada Inc. (Respondent) (Withdrawn)

1412-95-U: Labourers' International Union of North America, Local 183 (Applicant) v. Hurley Corporation (Respondent) (*Withdrawn*)

1445-95-M: Hurley Corporation (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1644-93-U: United Steelworkers Of America (Applicant) v. Group 4 C.P.S. Limited (Respondent) (Withdrawn)

4125-93-U: Yvonne Couperus (Applicant) v. C.S. Brooks Corporation (Respondent) (Dismissed)

3145-94-U: Ontario Public Service Employees Union and its Local 358 (Applicant) v. Peterborough and District Association for Community Living (Respondent) (*Withdrawn*)

3227-94-U: Domenic Fimognari (Applicant) v. Communications, Energy & Paperworkers' Union, Local 39 (Respondent) v. Lakehead Newsprint Limited (Intervener) (*Withdrawn*)

3288-94-U: Anna M. Farquhar (Applicant) v. Service Employees International Union, Local 478 (Respondent) v. Extendicare Health Services Inc. (Intervener) (*Dismissed*)

3501-94-U: Service Employees International Union, Local 204 (Applicant) v. 794641 Ontario Limited o/a Kelsey's (Respondent) (*Endorsed Settlement*)

3731-94-U: Bharat Goel (Applicant) v. York University Staff Association (Respondent) v. York University (Intervener) (*Dismissed*)

3757-94-U: Ralph Marion and Rolly Vautour (Applicant) v. International Brotherhood of Electrical Workers Local 1687 (Respondent) (*Dismissed*)

3766-94-U: United Steelworkers of America (Applicant) v. Dominion Castings Limited (Respondent) (Withdrawn)

3857-94-U: Sahodra Lindberg (Applicant) v. Randy Bruce, Administrator of GCIU Benefits Office (Respondent) v. Jay Nair, United Food and Commercial Workers International Union (C.L.C.-A.F.L.-C.I.O.) Local Union 175 (Intervener) (*Withdrawn*)

4224-94-U: Angello Malamas (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Dismissed*)

4249-94-U: Sahodra Lindberg (Applicant) v. United Food and Commercial Workers International Union, Local 175 and 633 (Respondent) v. GCIU-CPI Benefits Administration Corporation (Intervener) (*Dismissed*)

4328-94-U: Labourers' International Union of North America, Local 183 (Applicant) v. 1006571 Ontario Limited, Don Valley Storage Inc., Florian Kunst c.o.b. as Florian Management (Respondents) (*Withdrawn*)

4461-94-U: International Association of Machinists and Aerospace Workers, Local Lodge 1788 (Applicant) v. Invar Manufacturing Ltd. (Respondent) (*Withdrawn*)

4642-94-U: United Steelworkers of America (Applicant) v. Canadian Wildlife Federation Inc. (Respondent) (Withdrawn)

4677-94-U: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canac Kitchens Limited (Respondent) (*Endorsed Settlement*)

0118-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (Withdrawn)

- 0173-95-U; 1190-95-U: United Steelworkers of America (Applicant) v. J.P. Murphy Inc. (Respondent) (Withdrawn)
- **0252-95-U:** Roy Somir (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 1072 (Respondent) v. Canac Kitchens Limited (Intervener) (*Dismissed*)
- 0316-95-U: Santa Nato (Applicant) v. IBEW Local #636 (Respondent) v. Chubb Security Canada Inc. (Intervener) (Withdrawn)
- 0332-95-U: Steve Dicenzo (Applicant) v. Kerry Wilson, Winston Webb, I.U.B.A.C. Local #1 Ontario (Respondent) v. Stelco Inc., Hilton Works (Intervener) (Withdrawn)
- 0485-95-U: Henryk Bartnik (Applicant) v. Canadian Union of Public Employees (Respondent) v. University of Western Ontario (Intervener) (Dismissed)
- **0549-95-U:** Sheila M. Burwell (Applicant) v. Chrysler Canada Ltd., CAW Local 1459, CAW National Union (Respondents) (*Withdrawn*)
- 0587-95-U: David Gazit (Applicant) v. OPSEU (Local 557); George Brown College (Respondents) (Dismissed)
- 0612-95-U: Metropolitan Toronto Sewer and Watermain Contractors Association (Applicant) v. Pier Liugi Dolente Limited and Orazio Di Fulviis Investments Limited c.o.b. as Dolente Concrete & Drain Co., a Council of Trade Unions acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183, Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183 (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener) (Withdrawn)
- **0613-95-U:** Kenrick Khan (Applicant) v. Local 595 of the Independent Paperworkers of Canada (Respondent) v. Domtar Packaging (Intervener) (*Withdrawn*)
- 0617-95-U: Irena Siemaszko (Applicant) v. Christie Brown & Co., A Division of Nabisco (Respondent) (Withdrawn)
- 0648-95-U: Teamsters Local Union 938 (Applicant) v. J. E. Martel & Sons Lumber Limited (Respondent) (Withdrawn)
- 0727-95-U: Victor Apponi (Applicant) v. Earle Noble and Wayne Moorehouse of A & P Distribution Centre (Respondent) (Dismissed)
- 0763-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Budget Car Rentals Toronto Limited (Respondent) (Withdrawn)
- **0813-95-U:** Dalton Johnson (Applicant) v. Vince Johnson, Teamsters Local Union 938 and United Parcel Service (Respondents) (*Dismissed*)
- 0905-95-U: Thomas Eastman (Applicant) v. United Steel Workers of America, Local 7685 (Respondent) (Dismissed)
- 0913-95-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Atlantic Packaging Products Ltd. (Respondent) (Granted)
- **0918-95-U:** Teamsters Local Union No. 419 (Applicant) v. Cottrell Transport Inc., Mike O'Halloran and Neil Sharpe (Respondents) (*Withdrawn*)
- 0937-95-U: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Christian

Labour Association of Canada, C & D Limited and G. Castle Construction Corporation (Respondents) (Withdrawn)

0962-95-U: Labourers' International Union of North America, Local 597 (Applicant) v. 1020185 Ontario Limited, c.o.b. as Bloomington Landscape (Respondent) (*Granted*)

0968-95-U: Ontario Public Service Employees Union (Applicant) v. Canwood Inc. c.o.b. as Phoenix I and Phoenix II (Respondent) (*Terminated*)

1007-95-U: Andrew J. Carroll (Applicant) v. Ms. Heather Richmond, President, Ontario Public Service Employees Union Local 416 and Fred Upshaw, President, Ontario Public Services Employees Union (Respondents) v. Algonquin College of Applied Arts & Technology (Intervener) (*Withdrawn*)

1012-95-U: United Steelworkers of America (Applicant) v. Metropolitan Stores (MTS) Ltd. (Respondent) (Withdrawn)

1076-95-U: The Ontario Public Service Employees Union (OPSEU) (Applicant) v. Oaklands Regional Centre (Respondent) (*Withdrawn*)

1078-95-U: James Bird (Applicant) v. Bakery, Confectionery and Tobacco Workers International Union, Local 181, Dough Delight Ltd., Laurence Kuysten (Respondents) (Withdrawn)

1125-95-U: Susan Aram (Applicant) v. London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Respondent) v. YWCA of Kitchener-Waterloo (Intervener) (Withdrawn)

1172-95-U: United Steelworkers of America (Applicant) v. Videolux Canada Inc. (Respondent) (Withdrawn)

1178-95-U: I.W.A. Canada (Applicant) v. Pinehurst Woodworking Company Inc. (Respondent) (Withdrawn)

1240-95-U: International Union of Bricklayers and Allied Craftsmen, Local 2, Toronto, Barrie and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. Fahuki Construction Incorporated (Respondent) (Granted)

1241-95-U: Canadian Union of Professional Security-Guards (Applicant) v. Sun Life Assurance Company of Canada (Respondent) (*Withdrawn*)

1258-95-U: Dynamic & Proto Circuits Inc. (Applicant) v. IWA-Canada (Respondent) (Withdrawn)

1276-95-U: International Association of Machinists and Aerospace Workers (Applicant) v. Alzar Industries Inc. (Respondent) (Withdrawn)

1293-95-U: Rafael Nunez (Applicant) v. American Federation of Musicians, Toronto Musicians' Association Local 149, Don Ogilvie (Respondents) (Dismissed)

1307-95-U: Ronald Porter (Applicant) v. United Food and Commercial Workers Union Local 114P (Respondent) (Dismissed)

1317-95-U: United Steelworkers of America (Applicant) v. North American Steel Equipment Company Limited (Respondent) (*Endorsed Settlement*)

1341-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Alltype Storage Systems (Respondent) (Withdrawn)

1348-95-U: Service Employees International Union, Local 204 (Applicant) v. 794641 Ontario carrying on business as Kelseys (Respondent) (*Endorsed Settlement*)

1396-95-U: Andre P. Grondin (Applicant) v. Boilermakers Union Local 128 (Respondent) (Dismissed)

1428-95-U: Ontario Public Service Employees Union (Applicant) v. The Crest Centre Inc. (Respondent) (Withdrawn)

1437-95-U: Ruby Wilson (Applicant) v. Wellesley Hospital (Respondent) (Dismissed)

1483-95-U: United Steelworkers Of America (Applicant) v. J.M.P. Maintenance Ltd. (Respondent) (Withdrawn)

1491-95-U: Kelly R. Taylor (Applicant) v. O.P.S.E.U. (Respondent) (Dismissed)

1510-95-U: J. D. Beaton Local 218 (Applicant) v. Ontario Public Service Employees Union (Respondent) (Dismissed)

1564-95-U: Ontario Public Service Employees Union (Applicant) v. Community Resource Services (Ontario) (Respondent) (Withdrawn)

1567-95-U: Michel St. Pierre (Applicant) v. International Brotherhood of Electrical Workers (Respondent) (*Dismissed*)

1672-95-U: Aksentijevic Dragoljub (Applicant) v. Dempsters Bread (Respondent) (Dismissed)

APPLICATION FOR INTERIM ORDER

1227-95-M: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Marel Contractors Ltd. (Respondent) (*Dismissed*)

1349-95-M: Service Employees International Union, Local 204 (Applicant) v. 794641 Ontario Limited o/a Kelsey's (Respondent) (*Endorsed Settlement*)

1369-95-M: Ontario Public Service Employees Union (Applicant) v. The Ontario New Democratic Party Caucus (Respondent) (*Dismissed*)

1413-95-M: Labourers' International Union of North America, Local 183 (Applicant) v. Hurley Corporation (Respondent) (*Withdrawn*)

1429-95-M: Ontario Public Service Employees Union (Applicant) v. The Crest Centre Inc. (Respondent) (Withdrawn)

1447-95-M: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Culliton Brothers Limited (Respondent) (*Granted*)

1452-95-M: Canadian Union of Operating Engineers and General Workers (Applicant) v. Na-Me-Res (Native Men's Residence) (Respondent) v. Native Leasing Services (Intervener) (*Granted*)

1484-95-M: United Steelworkers Of America (Applicant) v. J.M.P. Maintenance Ltd. (Respondent) (Withdrawn)

1563-95-M: Ontario Public Service Employees Union (Applicant) v. Community Resource Services (Ontario) (Respondent) (*Withdrawn*)

1579-95-M: International Union United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 251 (Applicant) v. Waltec Components Division of Emco Limited (Respondent) (Terminated)

1607-95-M: Professional Association of Canadian Theatres ("PACT") (Applicant) v. Canadian Actors' Equity Association (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1479-95-M: Azim Babu Ramji (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Dismissed*)

1480-95-M: Azim Babu Ramji (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1197-95-M: Unifirst Canada Ltd. (Applicant) v. The Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Respondent) (*Granted*)

1268-95-M: Oxford Picture Frame Co. Ltd. (Applicant) v. International Union of Allied, Novelty and Production Workers, Local 905 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

0867-95-JD: Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1089 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1256, PCL Construction Limited, PCL Civil Constructors (Canada) Inc., PCL Constructors Inc., PCL Constructors Eastern Inc., PCL/McCarthy, a Joint Venture (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2147-94-M: The Sudbury Star (A Division of Thomson Newspapers Company Limited) (Applicant) v. Northern Ontario Newspaper Guild, Local 232 (Respondent) (*Granted*)

0998-95-M: Shirley Wentzell (Applicant) v. The Board of Education for the City of North York (Respondent) v. Canadian Union of Public Employees Local 1353 (Intervener) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

4614-94-OH: Steve Wheeler (Applicant) v. Olsten Staffing Services and Digital Equipment of Canada Limited (Respondents) (*Withdrawn*)

4649-94-OH: Peter Zawadowski (Applicant) v. Allcolour Paint Limited (Respondent) (Withdrawn)

0143-95-OH: The National Automobile and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 27 and employees - Alfred Cassar, William Dzegieris and Jose Friere (Applicant) v. Joe Berak, Industrial Relations Officer General Motors of Canada Ltd. (Diesel Division) (Respondent) (Withdrawn)

1169-95-OH: Hank Roossien (Applicant) v. Impact Auto Collision (Respondent) (Withdrawn)

COMPLAINTS UNDER THE ENVIRONMENTAL PROTECTION ACT

3113-94-EP: Allan Duxbury (Applicant) v. Vaillancourt Construction Limited, Emile A. Vaillancourt (Senior), Rejean Carriere (Respondents) (*Dismissed*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT (SEC. 36.1)

4357-94-M: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario Represented by Management Board of Cabinet - Essential and Emergency Services (Respondent) (Dismissed)

CONSTRUCTION INDUSTRY GRIEVANCES

3170-92-G: Labourers' International Union of North America, Local 506 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents) (Withdrawn)

0422-93-G; 0447-94-G; 3708-93-G: Labourers' International Union of North America, Local 837 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents) (Withdrawn)

0469-93-G; 3707-93-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents) (Withdrawn)

0942-93-G; 3709-93-G; 0444-94-G; 0445-94-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents) (Withdrawn)

0446-94-G; 1358-94-G; 3682—92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and, 352021 Ontario Limited (Respondents) (Withdrawn)

0759-94-G; 1108-94-G; 1109-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. 737049 Ontario Ltd. o/a D'Luxe Drywall (1987) (Respondent); Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Battlefield Drywall Inc. and 737049 Ontario Ltd. c.o.b. as D'Luxe Drywall (1987) (Respondents) (Terminated)

0992-94-G; 1286-94-G; 3690-94-G; 3908-94-G; 3909-94-G; 4230-94-G; 4231-94-G; 4569-94-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents); International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited, 352021 Ontario Limited (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Aquicon Construction Co. Ltd., (Respondent); International Union of Operating Engineers, Local 793 (Applicant) v. Aquicon Construction Co. Ltd. (Respondent); Labourers' International Union of North America, Local 506 (Applicant) v. Aquicon Construction Co. Ltd. (Respondent); International Union of Operating Engineers, Local 793 (Applicant) v. Aquicon Construction Co. Ltd. (Respondent); International Union of Operating Engineers, Local 793 (Applicant) v. Aquicon Construction Co. Ltd. (Respondent); International Union of Operating Engineers, Local 793 (Applicant) v. Aquicon Construction Co. Ltd. (Respondent); International Union of Operating Engineers, Local 793 (Applicant) v. Aquicon Construction Co. Ltd. (Respondent); International Union of Operating Engineers, Local 793 (Applicant) v.

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Ontario Labour Relations Board, 400 University Avenue, Toronto, Ontario M7A 1V4





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ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1995



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the Ontario Labour Relations Board

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EDITOR: RON LEBI

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to earlier revocation and awarding beds to a number of licensees, including "HG" - Board finding that part of Crown undertaking had been transferred to "HG", that there were valid bargaining rights to be transferred and that an intermingling of employees had occurred - Board finding that predecessor's collective agreement would have applied at time "HG" started combined operation in 1991 without a vote had *Crown Transfer Act* been applied as it should have been - Evidence not supporting submission that union had abandoned its bargaining rights - Application under *Crown Transfer Act* allowed - Employer's application for judicial review dismissed by Divisional Court

HERITAGE GREEN SENIOR CENTRE; RE SEIU, LOCAL 532, OLRB AND ONTARIO MINISTRY OF HEALTH.....

1236

Sale of a Business - Board finding sale of "part of a business" where successor having different "purpose" as a business than predecessor, but where successor producing same and similar products, using same machines on same premises aimed at same general market - Application allowed

SHIN HO CANADA LTD., SOLID WOOD RESEARCH INC.; RE IWA CANADA, LOCAL 2693.....

1217

Sale of a Business - Judicial Review - Union Alleging "sale of a business" where municipality cancelling its contract with transit company and "taking back" operation of municipality's transit system - Transit company found in earlier Board decision to be federal undertaking - Labour Relations Act amendments providing in section 64.1 that successor rights provisions applying to federal-to-provincial sales, but amendments coming into force only on January 1, 1993 - Respondents asserting that transaction occurred on December 31, 1992 and that section 64.1 of the Act having no application - Respondents also denying that transaction amounting to "sale of a business" - Board satisfied that by acquiring substantial part of work force previously employed by transit company, municipality transferring to itself an essential element of that business - Board concluding that municipality's hiring of employees on and after January 1, 1993 triggering sale and that section 64.1 of the Act applying to the transaction - Board finding and declaring sale of a business - Municipality applying for judicial review - Divisional Court quashing decision of the Board - Court of Appeal granting union's application for leave to appeal

1236

1154

Settlement - Unfair Labour Practice - Employee seeking to enforce settlement in which employer agreed to pay certain monies to applicant - Employer acknowledging that it has not complied with settlement - Board not accepting employer's submission that at time of settlement parties not *ad idem* because of misrepresentations and non-disclosure by applicant and counsel - Employer ordered to comply with settlement terms forthwith

BADLANDS, 487948 ONTARIO LIMITED AND PROPAN LTD., C.O.B. AS; RE DOFFY HAHN.....

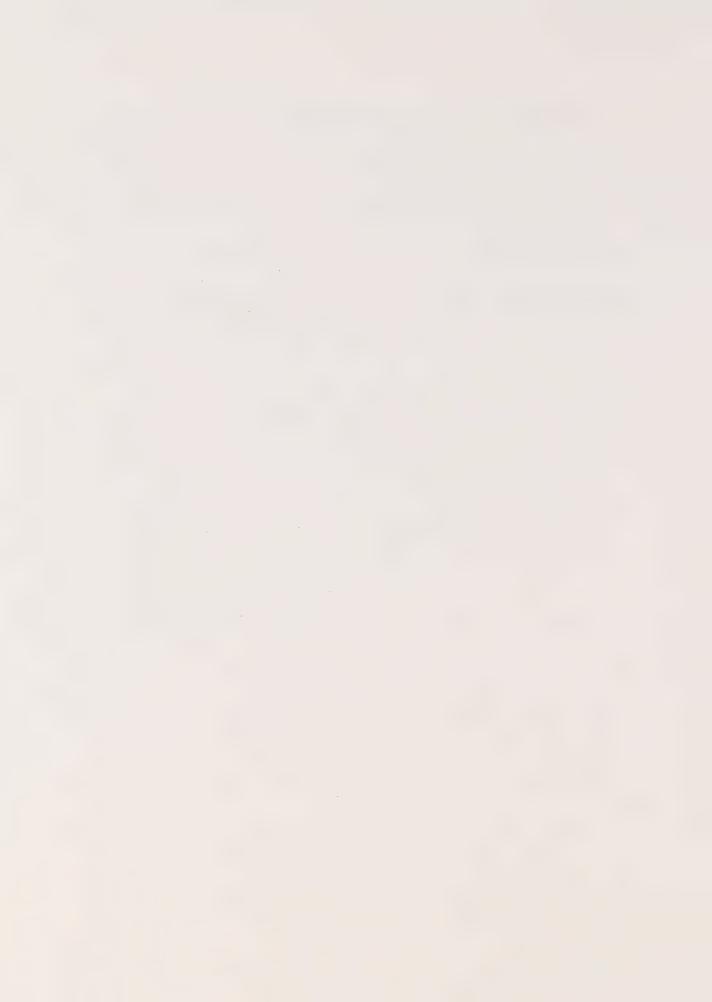
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	VII
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CORPORATION OF THE CITY OF NORTH YORK; RE CUPE, LOCAL 94	1170
Unfair Labour Practice - Settlement - Employee seeking to enforce settlement in which employer agreed to pay certain monies to applicant - Employer acknowledging that it has not complied with settlement - Board not accepting employer's submission that at time of settlement parties not ad idem because of misrepresentations and non-disclosure by applicant	

and counsel - Employer ordered to comply with settlement terms forthwith

BADLANDS, 487948 ONTARIO LIMITED AND PROPAN LTD., C.O.B. AS; RE DOFFY HAHN....

1154



0913-95-U Communications, Energy and Paperworkers Union of Canada, Applicant v. Atlantic Packaging Products Ltd., Responding Party

Discharge - Discharge for Union Activity - Practice and Procedure - Unfair Labour Practice - Board not permitting union to amend its application mid-way through employer's case - Board unable to accept employer's explanation for discharging key union supporter - Application allowed - Reinstatement with compensation ordered

BEFORE: Laura Trachuk, Vice-Chair.

APPEARANCES: Melissa Chronic, Ray Bowman and Judy Clement for the applicant; W. J. Hayter, Tracey Starrett and Sencar Tuncay for the responding party.

DECISION OF THE BOARD; September 26, 1995

INTRODUCTION

1. This is an application under section 91 of the *Labour Relations Act* in which the applicant (hereafter referred to as "the union") alleges that the responding party (hereafter referred to as "the company") violated the Act by terminating the employment of Judy Clement. Given the nature of this application, the Board considered it appropriate to issue a "bottom-line" decision. On July 21, 1995 the Board found that the company had violated the Act and made the following orders:

"... the Board hereby:

- a) declares that the responding party has violated sections 65, 67 and 71 of the Labour Relations Act;
- b) directs that Judy Clement be reinstated to employment in a position with the responding party at her former rate of pay. (The applicant asked only that Ms. Clement be reinstated to "a position" not her former position.);
- directs that Judy Clement be compensated by the responding party for losses of income and benefits arising from the termination of her employment;
- d) directs that the responding party post for 60 consecutive days in conspicuous places in the workplace the Notice to Employees attached as Appendix "A" hereto [not reproduced here]."

This decision sets out the reasons for the above orders.

- 2. The parties called a number of witnesses whose testimony occasionally conflicted on material points. In reaching its findings of fact, the Board has evaluated the testimony of the witnesses according to the usual factors including their demeanour while giving evidence, the clarity and consistency of the evidence given, the ability to recall events and to resist the tug of self-interest, as well as what makes most sense in the circumstances.
- 3. Mid-way through the company's case, the union sought to amend its application to include further particulars with respect to Ms. Clement's support for the union. However, the Board did not consider it appropriate to permit the applicant to amend its application at that point in the proceedings. The company was required to call its evidence first due to the reverse onus in applications of this nature. It had previously requested that the union provide it with further partic-

ulars prior to the hearing and the union had, to some extent, complied. The responding party was entitled to know the case it had to meet before commencing to call its evidence. That is one of the primary purposes of the Board's rules with respect to pleadings. In this case, the particulars which the union sought to add referred to an event which one of the company's witnesses who had already testified was alleged to have seen. That witness would have had to have been recalled and the company would have had to adjourn the hearing to investigate the new particulars, some of which related to an individual who was no longer an employee. The company had called its evidence and organized its case in reliance on the pleadings which had been filed. The union's only explanation for not filing the particulars earlier is that its advisors had just remembered them. In these circumstances, the Board concluded that it was not appropriate to permit the applicant to amend its pleadings.

DECISION

- 4. The Board's approach to complaints of this nature was outlined in *Barrie Examiner*, [1975] OLRB Rep. Oct. 745 which was referred to by both parties. The relevant passage states as follows:
 - 17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer . . . did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.* [1974] O.L.R.B. 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.
- In this case, the company claims that it terminated Ms. Clement on May 26 at the very end of a six-month probation period because she was an inadequate employee. After reviewing all of the facts, however, the Board did not believe that Ms. Clement was subject to a six-month probation period. That led the Board to conclude that the probation period was manufactured by the company in May 1995 to facilitate its termination of Ms. Clement. May 1995 was the period between the date that the application for certification was filed by the union and the date when that application was disposed of by the Board. The application was first filed at the beginning of April and was not finally disposed of until June 23, 1995. The parties indicated that this delay was due to the fact that it was necessary to process the application or post the "notice to employees" three times. Given the timing of Ms. Clement's termination and the Board's lack of confidence in the legitimacy of the explanation for that termination, the Board concluded that the company had not met its onus of proving that Ms. Clement was not terminated for anti-union reasons. Although there was no direct evidence that anyone in management knew of Ms. Clement's support for the union, that is not uncommon in cases of this nature and the Board is often asked to infer knowledge on the basis of circumstantial evidence such as the harshness of the penalty or the timing of the discharge, etc. (See CMP Group (1985) Ltd., [1993] OLRB Rep. Dec. 1247; Pop Shoppe (Toronto) Limited, [1976] OLRB Rep. June 294; Sun Parlour, [1972] OLRB Rep. Jan. 94; Fabricland Distributors, [1991] OLRB Rep. July 836. In Ronal Canada Inc., (April 10, 1989, unreported), the Board described its approach as follows:

^{33.} Within this factual framework we now turn briefly to examine the law. The Board has long held that in assessing whether an employee's discharge was a violation of the *Labour Relations*

Act, we must look to all the circumstances surrounding the discharge. An examination of all the circumstances is not to determine whether there is just cause for the discharge or whether the discharge was "fair" or "unfair" in some objective sense. Rather, our task is to determine whether the discharge was motivated in whole or in part by the employees' union activity, or by their exercise of rights conferred upon them by the Act. In appropriate cases, however, an employer's conduct which is arbitrary, patently unfair or unreasonable, unduly harsh, precipitous, or a response which is extraordinary given the employer's previous practice, may lead to an inference of anti-union animus. The Board has long accepted that, in contested section 89 [now 91] complaints one would not normally expect an employer to openly or candidly admit that it acted in contravention of the Act. For this reason, in cases where discharge takes place in the shadow of the union organizing campaign or involves a "key" employee organizer, the Board carefully scrutinizes the employer's conduct and surrounding circumstances to determinate if the "true" or "real" motive (or one of the motives) of the employer was tainted by anti-union animus.

[emphasis added]

In this case, a number of the employee witnesses testified that they knew Ms. Clement supported the union. Ms. Clement testified that she had circulated a pro-union document, which was entered as an exhibit. Ms. Clement therefore had an active, albeit limited, role in the union's campaign and at least some of her co-workers were aware of it. The Board is prepared, in these circumstances, to conclude that management was also aware of Ms. Clement's support for the union and was at least partially motivated by that fact in terminating her employment. The Board reaches that conclusion based on its finding that the company manufactured a probation period to terminate her when there was, in fact, little reason for such extreme action. While Ms. Clement may well have benefited from some further training as promised, there was no rational reason to terminate her given that she had not received a single criticism of her performance during the first five months that she was doing her job.

FACTS

General Matters

- 6. The company has two adjacent plants at its Whitby location where these events took place, a tissue mill and a newsprint mill. It receives waste paper which it then recycles into newsprint or tissue. There are approximately 150 employees in the newsprint mill and 25 in the tissue mill. In the tissue mill the employees work on one of four teams. Each team has three positions. Each of the three positions requires the attainment of different levels in the company's "Pay for Skills" scheme. The company claimed that each team member must eventually be able to work in any position although the evidence disclosed that employees no longer regularly rotate their positions.
- 7. Ms. Clement and another employee, Mr. Lind, were hired in November 1994 as "spares" in the tissue mill. A spare is used to fill in the least skilled position on each team when a team member is absent. Prior to November 1994 spares were temporary or "agency" employees. The company staffs its plants through a complicated system of permanent, temporary and agency employees. Ms. Clement had worked in the newsprint mill since 1991 and had, at various times, been a temporary, a permanent and an agency employee. She was encouraged by her supervisor in the newsprint mill to apply for the permanent position in the tissue mill and received an excellent recommendation from him for that position.

The Probationary Period

8. As noted in the introduction, the responding party's assertion that Ms. Clement was on a six-month probation is central to this matter. The company claims that it is because Ms. Clement

was on probation that she was terminated in May, 1995 with almost no previous "record" of discipline or inadequate performance. The company also claims that it is because Ms. Clement was on probation that she was not given access to a Peer Review Panel prior to her termination. If Ms. Clement was, in truth, not on probation, the probation period is an excuse manufactured by the company to terminate her. In the end, the Board was asked to accept that Ms. Clement was subject to a six-month probation period, in spite of evidence that she had never been so advised, there was little documentary support for such an assertion, and no one else in the tissue mill had ever had a six-month probationary period.

- 9. When Ms. Clement and Mr. Lind were interviewed for the spare position they were not advised that they would be subject to a six-month probation period. Upon being hired, they had an orientation meeting with the human resources manager, Tracey Starrett, and again they were not informed of any six-month probationary period although they were advised that there would be a two-month "waiting period" for benefits. Ms. Starrett acknowledged that she may have forgotten to mention the six-month probationary period in the meeting. She submits that she did refer to a two-month "waiting period" for benefits. Mr. Lind did not testify. On the basis of the evidence, the Board finds that if any probationary period was mentioned in the orientation meeting, it was for two months only.
- 10. The written offer of employment sent to Ms. Clement does not refer to any probation period although at least one previous offer for a part-time position which she had received did. Ms. Starrett testified that she once again forgot to include any reference to the probationary period in the letter.
- 11. The application for employment filled out by Ms. Clement indicates that a "first review" is to be held after six months but this section of the form was filled out some time after Ms. Clement was hired and she never saw it. In any case, it does not refer to a "probation" period.
- No one else in the tissue mill had ever served a six-month probation period. The company claimed that it had only recently decided to implement it. The company relies on a memorandum dated January 1994 entitled "Pay for Skills" which refers to a six-month probationary period. The "Pay for Skills" memorandum appears to be a proposal of some sort which deals with the milestones employees must achieve before they can can increase their skill levels and therefore their wage rates. It is not a document dealing with general employment matters. After reading the document as a whole and in conjunction with the various handbooks introduced into evidence, the Board finds that it could be interpreted, as it was by a number of witnesses, as referring to a sixmonth training period required at the lowest skill level in the Pay for Skills system. The "system" appears to require a "training period" before an employee can move from one skill level to a higher one. It is clear in the Pay for Skills memorandum that during the six-month training period a number of tests and reviews are supposed to occur which did not take place. In fact, it appears that the real purpose of the six-month training period is closely tied to the tests. The company's witnesses claimed that they had decided it would be fairer to give the tests after the six-month probation had been completed. However, no one ever provided Ms. Clement with this document, let alone anything indicating she would be excused from the tests.
- 13. A number of other documents identified as employee handbooks of various vintages and in various stages of revision were also introduced in the evidence. None of them refer to a sixmonth probation period, although it is significant that the most recent one which was circulated for review in early 1995 refers to a *two-month* probation period.
- 14. The mill manager, Mr. Tuncay, acknowledged that as Ms. Clement was on probation he was supposed to be providing her with periodic reviews. However, he claimed that he was preoccu-

pied with technical problems and forgot to do so. He also asserted that he was alerted to the fact that Ms. Clement was nearing the end of her probation and that he therefore had to determine whether to continue her employment when he received an "alteration form" from payroll in early May. However, the company was unable to produce this form for either Ms. Clement or Mr. Lind. The company also did not call any witness to confirm that she or he had generated such a form. Mr. Tuncay and Ms. Starrett both testified that Mr. Lind had successfully passed his probation but no action has been taken to mark this event. No evaluation has been performed of him and there does not appear to have been any communication to payroll about a salary increase.

- A warning letter to Ms. Clement dated May 19 from Mr. Tuncay mentions a probation period for the first time. The company relies upon this letter as evidence that she had been on probation for the previous six months. However, the letter says nothing about a six-month probation period nor does it mention that her probation period would be over on May 28. The Board finds Ms. Clement's explanation that the letter referred to her being placed upon probation on May 11 to be more plausible in all the circumstances.
- 16. On May 10 Ms. Clement had an accident with a clamp truck. She hit the sprinkler system and damaged some product. The amount of damage was somewhat disputed but the value was approximately \$3,000.00. On May 11, Ms. Clement met with Mr. Tuncay and Ms. Crawford from human resources. Ms. Clement testified that she was advised that she was receiving a verbal warning, that she was being placed on probation and would receive training on the clamp truck and the grinding machine. She was also advised that there had been a complaint about the way she grinds the blades. On May 19 Ms. Clement received the letter which purported to be a written warning for the May 10 incident. It indicated that she would receive training on the grinding machine and the clamp truck and that her performance would be reviewed at the end of her probation. Mr. Tuncay testified that he advised Ms. Clement on May 11 that she would receive a written warning and denied that he advised her she was being placed on probation. Ms. Crawford, the human resources representative, did not testify and the applicant urges the Board to draw an adverse inference as a result of that omission.
- 17. The Board finds that the reference in the May 19 letter to probation is a reference to Ms. Clement being placed on probation in May, after the company became aware of the application for certification. As stated above, it is highly improbable that if Ms. Clement was on probation previously she would never have been advised of it. The Board is supported in this finding by the company's failure to call Ms. Crawford to corroborate Mr. Tuncay's version of events.
- 18. For all of these reasons, the Board found that Ms. Clement was not subject to a probation period as claimed by the company. This is not a company with unsophisticated employment practices and it is just not credible that it could repeatedly forget to advise an employee that she was on probation until it was essentially over. It is not convincing that Ms. Starrett forgot to mention it in the job interview, the orientation interview and the offer of employment, and that no one ever remembered to do any review of Ms. Clement's performance or to talk to her in any way about her probation until May, 1995.

Other Facts with respect to Ms. Clement's Termination

19. The other circumstances surrounding Ms. Clement's termination also lead to the conclusion that the reasons provided by the employer for its action are not the real or only reasons. As noted above, Ms. Clement had an accident on May 10 and received a written warning on May 19. It is not necessary for the Board to decide whether she had originally been advised it would be a verbal warning as the critical consideration is that the company had determined that the appropriate response to that accident was, at most, a written warning, not termination. As a result of that

- accident, Ms. Clement was advised that she would receive training on the clamp truck and the grinding machine but she was terminated on May 28 before it could be provided.
- Mr. Tuncay testified that during the week of May 21 he met individually with six of Ms. 20. Clement and Mr. Lind's co-workers and inquired about their performance. He produced what he claimed were contemporaneous notes of these meetings although the notes did not indicate which employee made which comments. Mr. Tuncay advised the Board that each of the employees asked him not to record his name. Mr. Tuncay claimed that the employees were complimentary about Mr. Lind but critical of Ms. Clement who, they are alleged to have said, did not have the mechanical inclination to progress to the higher-skilled jobs. However, Mr. Tuncay only asked members of three of the four teams for their opinion of Ms. Clement prior to her termination. He claimed that he did not ask for the opinion of anyone on Team C, as they were not working during that week and were not available. He also explained that in any case he had asked Mr. English from Team B, the team Ms. Clement worked with most of the time. However, these assertions were not true. Team C was working the night shift which starts at 6:30 p.m. on Monday and Tuesday that week and was working the day shift that Friday. Furthermore, Ms. Clement worked most frequently with Team C although not during the months of April and May. However, she worked more frequently with Team C than with Team A or Team D during April and May and the views of five members of those teams were allegedly canvassed. Also, while she worked most often with Team B in the month of May, only one Team B member, Mr. English, was interviewed. The failure to consult Team C is significant as Team C, or at least its team leader, would have been supportive of Ms. Clement retaining her employment. The team leader, Roger Morris, testified that it was not unusual for Mr. Tuncay to stay until the night shift team arrived if he wanted to talk to them. He has also been known to telephone them in the evening. Therefore, Team C was certainly available if he had wanted to ask them about Ms. Clement. Mr. Tuncay claimed that he met with Team C after Ms. Clement was terminated and that they agreed with his decision. Mr. Morris denied that he or his team members had agreed with the decision and testified that he found Ms. Clement to be a good worker.
- 21. Mr. English from Team B testified that he was consulted by Mr. Tuncay. He said that he thought Ms. Clement had performance problems. However, the problems that Mr. English testified he related to Mr. Tuncay were not the same as those Mr. Tuncay claimed he told him. He also denied that he had asked Mr. Tuncay not to write down or disclose his name.
- Therefore, under the guise of a probationary review Mr. Tuncay solicited criticism from employees of Ms. Clement's performance and allegedly on the basis of that information she was terminated. May 28, the ostensible end of her probation period, fell on a Sunday so Mr. Tuncay insisted Ms. Clement come in on May 26 even though she had taken the day off to take her child to the hospital. He claimed that he filled out an evaluation form in front of her and then terminated her employment. Ms. Starrett testified that Mr. Tuncay filled out the form prior to the meeting with Ms. Clement. The company was unable to produce the original of the document which had been filled out by Mr. Tuncay. The copy that was introduced into evidence is revealing however. Mr. Tuncay rated Ms. Clement at the lowest levels in almost every category on the form. The ratings she received appear to be lower than the limited information and criticism Mr. Tuncay claimed to have received from the other employees would warrant. This evaluation appears to be an effort to have some kind of paper record of Ms. Clement's alleged deficiencies. However, rather than supporting the company's position, its excessive negativity supports the conclusion that the company had some other purpose in terminating her.
- 23. Mr. Tuncay testified that his decision to terminate Ms. Clement was based on the criticism he solicited from her co-workers. The Board finds it difficult to understand, however, how an

experienced mill manager could terminate an employee in these circumstances unless he had some other motive. Ms. Clement had come highly recommended from the newsprint mill. Mr. Tuncay had failed to systematically review her work himself at any time, but had never noted any problems until the clamp truck incident in May. He spoke to only half of her co-workers, and failed to speak to most of those she worked with most often. He gave her no opportunity for improvement once concerns had been brought to her attention. It is improbable that an experienced manager would take the step of terminating an employee, particularly one who had worked at the company for four years, in such circumstances unless he had another motive.

The Peer Review Panel

- 24. As part of the company's team approach, it has a number of joint employee/management committees. One of these committees is the Organizational Review Board (ORB). The company also has a policy of instituting a Peer Review Panel (PRP) before terminating employees. Ms. Starrett testified that she wanted confirmation from the ORB of management's view that the PRP was not available to probationary employees before Ms. Clement was terminated. As the ORB was not scheduled to meet until a few days after Ms. Clement's alleged probation period was over, Ms. Starrett claimed that she sought out the members individually. She testified that the ORB members told her that they wanted to consider the matter but that the company could take any action it needed in the meantime. In other words, Ms. Starrett claims that the ORB members advised her that they did not know if probationary employees had the right to go to a PRP but she could go ahead and ignore that right if it did exist. Mr. English, who is an ORB member, did not testify regarding any such conversation. When the ORB did meet to discuss whether a PRP should be available to probationary employees, shortly after Ms. Clement was terminated, it decided that it should not be available to probationary employees but that the company must have a system of periodic review in place. It appears that the committee's view was based at least partly on the fact that the original employee handbook exempted probationary employees from the PRP although later versions of the handbook had not specifically done so. Ms. Clement received neither a review by the PRP nor periodic review of her performance, the first review being the day that she was fired.
- 25. This evidence about whether Ms. Clement would have access to the PRP supports the finding that the company had reasons other than those it expressed for terminating her. By avoiding the PRP, the company could avoid having to justify her termination. If Ms. Clement was not on probation she would have been entitled to go to the Peer Review Panel which would mean that the company would have to demonstrate to a panel of other employees that it had good and sufficient reason to fire her. That might have been a hard case for the company to make given the fact that Ms. Clement had not received a single criticism of her work until May, 1995.
- 26. Furthermore, if Ms. Clement really was on probation and it became apparent in May that everyone had forgotten both to mention it to her and to do any periodic assessment of her, why did the company not just extend her probation period so it could assess her properly? The company had extended an employee's three-month probationary period on at least one prior occasion. One of the central purposes of a probationary period is to monitor an employee's progress so that she will have an opportunity to improve any deficiencies. Mr. Tuncay testified that he decided not to extend Ms. Clement's probation period because he concluded on the basis of her fellow employees' comments that she would not be a successful employee in the future. That claim, however, rings hollow when one considers that he had promised her further training a mere week before the termination, which was not provided. It is also inconsistent with his claim that he had not been able to contact the members of one of the shifts. The Board also notes that Ms. Clement had received an outstanding recommendation for her years of work in the newsprint mill and Mr.

Tuncay admits that he failed to review her periodically himself. If the probation period was *bona* fide, one would have expected the company to take a closer look at this situation before terminating Ms. Clement's employment.

- For all of the above reasons, the Board could not accept the company's explanation for why it terminated Ms. Clement and found that it therefore had another motive.
- 28. The fact that the company concocted the probationary period in May, 1995 leads the Board to conclude that it was inspired by anti-union animus. The termination took place during the period between the date the company was advised that an application for certification had been filed and the Board's disposition of it. During this period the parties do not know whether they may be facing a vote and the employees are therefore vulnerable to any chilling effect that terminating a known union advocate may have. The Board notes that the company never made an alternative argument that even if it had manufactured the probationary period to terminate Ms. Clement it was motivated by something besides her support for the union.
- 29. For all of the above reasons, the Board found that the company terminated Ms. Clement for unlawful reasons and made the orders outlined in its July 21, 1995 decision. The applicant also alleged that the company had violated the "statutory freeze" by placing Ms. Clement on probation after the application was filed and by denying her access to the Peer Review Panel. However, the remedy being sought for that allegation is the same as that already granted for the violations of the other sections of the Act and the Board therefore finds it unnecessary to determine whether the company has also violated section 81.

4587-94-U Doffy Hahn, Applicant v. 487948 Ontario Limited and Propan Ltd., carrying on business as **Badlands**, Responding Party

Settlement - Unfair Labour Practice - Employee seeking to enforce settlement in which employer agreed to pay certain monies to applicant - Employer acknowledging that it has not complied with settlement - Board not accepting employer's submission that at time of settlement parties not ad idem because of misrepresentations and non-disclosure by applicant and counsel - Employer ordered to comply with settlement terms forthwith

BEFORE: Gail Misra, Vice-Chair, and Board Members J. A. Rundle and B. L. Armstrong.

APPEARANCES: Rochelle F. Cantor and Doffy Hahn for the applicant; Craig Colraine and Alek Korn for the responding party.

DECISION OF THE BOARD; September 14, 1995

- 1. The title of this proceeding is amended to describe the responding party as: "487948 Ontario Limited and Propan Ltd., carrying on business as Badlands".
- 2. This is an application made pursuant to section 91(7) of the *Labour Relations Act* in which Doffy Hahn alleges that the responding party (also referred to as "Badlands") has failed to comply with the terms of a settlement reached on October 19, 1994. The relevant section of the Act states as follows:

- 91.-(7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).
- 3. Counsel for the two parties to this application made their submissions to the Board. No evidence was called. The documents which had been submitted to the Board with the application were relied upon by both parties. There was no real dispute on the substantive facts underlying the application and those facts are outlined below.
- 4. Ms. Hahn was dismissed from her employment as a bartender at Badlands on January 1, 1994. On April 1, 1994 Ms. Cantor, acting on Ms. Hahn's behalf, filed an application under section 91 of the Act alleging that a number of responding parties, including the responding party to this application, had committed unfair labour practices. In that application Ms. Cantor named Dwayne Whitford as a person who may be affected by the application because he had been involved in assisting Ms. Hahn in an organizing drive at Badlands and had subsequently been fired from Badlands. Whitford had also been dismissed in January 1994.
- 5. After the applicant had requested two adjournments of hearing dates, the matter was finally scheduled for hearing on October 19, 1994. The applicant had intended to call Mr. Whitford as a witness so he was present at the Board on October 19, 1994. Prior to the matter being heard, however, the parties reached a memorandum of settlement which states as follows:

LABOUR RELATIONS ACT

APPLICATION UNDER S. 91 OF THE ACT

BEFORE THE LABOUR RELATIONS BOARD

BETWEEN:

DOFFY HAHN

(Applicant)

and

BADLANDS, RANDY FILBY, ALBERT DAVIS, ALEK KORN

(Respondents)

MINUTES OF SETTLEMENT

The parties hereto agree to settle the Application, and all other matters relating thereto, on the following terms:

(1) The Applicant shall withdraw the Application herein on October 19, 1994, which Application shall not be pursued or re-constituted in any form.

- (2) The Respondent, Badlands, shall pay to the Applicant the sum of \$4,500.00 payable by way of post-dated cheques to be provided October 21, 1994, as follows:
 - (i) \$500.00 payable October 19, 1994;
 - (ii) \$2,000.00 payable Nov. 1, 1994; and
 - (iii) \$2,000.00 payable Dec. 1, 1994.
- (3) The Applicant shall withdraw any and all complaints which may have been filed with the Ontario Human Rights Commission, the Canadian Human Rights Commission, and any and all tribunals which do or may have jurisdiction relating in any way to the employment and dismissal of the Applicant by Badlands, no later than October 21, 1994.
- (4) The Applicant shall not commence any action for damages relating to her dismissal by Badlands, or with respect to any matter regarding her employment by Badlands, against the Respondents.

Dated at Toronto this 19th day of October, 1994

"Alek Korn"

Randy Filby

"A. Davis"

Alek Korn"

BADLANDS

per: Alek Korn (I have authority to bind Badlands)

"R. A. Filby"

Randy Filby

"A. Davis"

Albert (BVD) Davis

"Alek Korn"

- 6. On October 20, 1994 Mr. Colraine, acting for Badlands, wrote to Ms. Cantor indicating that his client would be sending to her office by courier the cheques as required by the Minutes of Settlement executed on the day before.
- 7. On October 20, 1994 Ms. Cantor, on behalf of Mr. Whitford, filed an application under section 91 of the *Labour Relations Act* alleging that the employer had committed unfair labour practices of the same ilk as had been alleged in the Hahn application.
- 8. By a letter dated October 21, 1994 Mr. Colraine recounted to Ms. Cantor a telephone conversation they had had that morning in which Ms. Cantor had advised Mr. Colraine she was acting for Mr. Whitford and was filing a complaint with the Labour Relations Board with respect to the same or similar matters raised in the Hahn complaint. The letter indicated that Mr. Colraine was of the opinion that the new complaint was "underhanded and clearly in breach of the spirit of the settlement. . ." and that Hahn and Whitford were acting in bad faith. He indicated further that his client would not be delivering the settlement monies pending resolution of this matter. It is not disputed that at a hearing before the Board into the Whitford application, Mr. Whitford gave evi-

dence that he had delayed in filing his application until October 1994 on the advice of his counsel, Ms. Cantor.

- 9. In a letter dated October 24, 1994 Mr. Colraine advised Ms. Cantor that on October 19, 1994, the date of the settlement, his client obtained information regarding the authenticity of certain documents. Given the nature of this information, he was of the view that the settlement would be void. Mr. Colraine expressed his shock that Ms. Cantor had, as a solicitor, negotiated the settlement in question when she knew Mr. Whitford was present, and knew that she would be commencing a separate application on Mr. Whitford's behalf after the Hahn settlement had been reached. During the negotiations Ms. Cantor had disclosed that Ms. Hahn would be taking action against the union, however, there was no mention of Mr. Whitford's pending application. In Mr. Colraine's view in this letter, Ms. Cantor had therefore "deliberately attempted to ambush the Respondents" during the negotiations.
- 10. The situation giving rise to Mr. Colraine's letter is outlined below. No certification application was ever filed with respect to this employer. Counsel for the applicant provided the responding parties with all of the union membership cards which had allegedly been signed by Badlands employees. On October 28, 1994 Lee Dermott, an employee at Badlands, made a statutory declaration that while a union membership card had apparently been created by Ms. Hahn bearing Ms. Dermott's name and signatures, Ms. Dermott had never expressed any interest in joining the union, and had not signed any union membership card. In a statutory declaration dated April 26, 1995 Ms. Hahn declared that one employee did authorize Ms. Hahn to sign a union membership card on her behalf. Since the union organizer apparently told Ms. Hahn she could complete a union membership card by proxy, she did so. Nowhere in the statutory declaration is it made clear whether Ms. Hahn is referring to Ms. Dermott. It was on the basis of Ms. Dermott's declaration that Mr. Colraine questioned the authenticity of some of the membership cards, and questioned Ms. Hahn's role in the collection thereof.
- 11. No action appears to have been taken until the present application was filed on March 23, 1995. The responding party admits it has not complied with the terms of the settlement, although the applicant has complied with her terms. However, it is argued on behalf of Badlands that the settlement itself was not entered into in good faith by the applicant and her counsel, and that the parties were not *ad idem* at the time of reaching the settlement because of the misrepresentations and non-disclosure of the applicant and her counsel. It is posited that Ms. Cantor and Ms. Hahn should have informed the responding parties at the settlement discussions that Mr. Whitford was about to file a similar application to the one being settled, and that to not do so was a deliberate action of non-disclosure which was material to the settlement discussions. It is suggested further that the issue raised by the Dermott statutory declaration shows a further lack of good faith and *bona fides* on the part of the applicant. Since Badlands had not seen the union cards prior to the settlement, there had been no opportunity to check this matter prior to the negotiations, and therefore, Badlands had acted without knowledge in reaching the settlement it did.
- 12. It is the applicant's position that the only parties to the settlement were those named as parties on the original application, and they did not include Mr. Whitford. Since the settlement document is simple, has no confidentiality clause, and does not bind any other persons, it should be complied with by Badlands. To place on the applicant the burden of disclosing what other litigation may be instituted by some other parties is too onerous a burden to place on an applicant participating in settlement negotiations. On behalf of the applicant it is argued that Badlands itself did not disclose it was in the process of selling the business, which it did about one week after the settlement was reached. The applicant also asserts that the responding parties never applied to the Board to have the settlement set aside, so they took no action even after it had come to their atten-

tion that there was another application being filed and an issue about the authenticity of the membership card. Counsel for the applicant states that she was not acting for Mr. Whitford on the date of the settlement, but was representing Ms. Hahn in her hearing at the Board.

- When the Board inquired of the parties what the prejudice may be to them should the settlement be set aside, Badlands' position was that since the delay in the first application coming on for hearing, and subsequently, was the applicant's, the Board could address that issue when deciding on the remedy question. In any event, the sale of Badlands occurred on October 24, 1994 and the business closed at that juncture, so there would be no continuing damages beyond that date. Since the corporate entities comprising Badlands are still live, it was felt there would be no prejudice to the responding party if the matter was resuscitated.
- 14. Counsel for the applicant indicated there would be substantial prejudice to the applicant's ability to present her case as witnesses are no longer available since Badlands closed in October 1994. There were some internal union problems between two union entities at the time and it is unclear if the individuals who had been involved with the campaign at Badlands would be available, and even if available, it is likely that memories would have faded since the campaign in January 1994.

DECISION

15. The value and importance of the settlement process in labour relations cannot be overstated. Settlement documents are not and should not be entered into lightly, and as a general rule, a party seeking to resile from a settlement document will not be looked upon favourably by the Board. As the Board observed in *Crown Electric*, [1978] OLRB Rep. Apr. 344, at paragraph 17:

Parties who enter into written settlements have a responsibility to ensure that they are fully aware of the implications of any document to which they attach their signatures. In the absence of any allegation of fraud the Board must assume that parties have agreed to any settlement plainly expressed in a written document, or otherwise no settlement would be immune from a subsequent challenge.

- The allegations made on behalf of the employer in the case before us do not amount to fraud. It cannot be said that the applicant or her counsel should have to disclose to the responding party that there may be others who may file similar claims. Indeed, it would be impossible for one applicant to make such a disclosure on behalf of some other individual. It may well be that counsel would also be in breach of the professional rules of conduct to disclose who her other clients may be and that such persons *may* be filing a complaint against this responding party. From the submissions made to us, it is not at all clear that the responding party asked whether Mr. Whitford would be filing a complaint. Had that question been asked of Ms. Cantor and answered in the negative, there may have been some cause for complaint. Even in that event, however, it is unclear whether the Board would have allowed the responding party to resile from the settlement, as the settlement concerned Ms. Hahn and Ms. Hahn cannot in those circumstances be held responsible for the actions of her counsel.
- 17. While the responding party's allegations about the membership evidence are troubling, it is to be remembered that no application for certification was ever filed and the Board had no opportunity to consider the membership cards. Therefore, no findings have been made about the card in question, and no fraud was found to have been perpetrated on the Board. Even in the event that such a finding had been made, it would have affected the certification application, and not Ms. Hahn.
- 18. It is counterproductive to the overall efficacy of the settlement process for the Board to

evaluate the parties' motivations or the terms of particular settlements. The Board seeks to protect, in accordance with its legislated mandate in section 91(7) of the Act, the settlements reached by the parties. Where the terms of the settlement are clear, parties should not expect to be allowed to depart from the terms they have agreed to, or to be relieved of the consequences of their settlement because the situation changed after the settlement.

19. As the Board wrote in its decision in Lambton County Board of Education, [1987] OLRB Rep. Oct. 1277:

The purpose of section [91] is to secure a prompt, final and binding resolution of unfair labour practice complaints. The Act expressly recognizes and endorses the settlement of such complaints without a formal Board hearing decision. The provisions of section [91] are intended to facilitate settlements. Under section [91(7)], where the matter complained of in the section [91] complaint has been settled, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties who agreed to the settlement. Indeed, section [91(7)] makes non-compliance with a written settlement a breach of the Act. Each year, trade unions, employees, and employers file thousands of applications or complaints before the Board. A large majority of them are settled. Sometimes the settlement favours a trade union or an employer. Other times it favours an employee. Usually it represents a compromise under which the parties neither achieve as much nor risk as much as they would by proceeding to a hearing before the Board. The parties generally arrive at a settlement in order to avoid the cost and uncertainties of litigation. The orderly resolution of Board proceedings and the efficacy of the settlement process would be gravely prejudiced if, having signed Minutes of Settlement, the party could afterwards repudiate the settlement. . .

- 20. In this settlement only the *parties* to the application agreed to the settlement and the person who was to receive the benefits and who had the obligations under the settlement was Ms. Hahn. The terms of the settlement are clear. The parties to the settlement both had counsel to advise them. Ms. Hahn has purportedly fulfilled her part of the bargain. It remains for the responding party to comply with the settlement.
- Counsel for the responding party submitted three decisions in civil cases for the Board's consideration. While we have read and considered all of the cases, we have not found them to be of assistance to us in reaching our decision. In *Canadian Imperial Bank of Commerce v. Weinman* (1992) 6 C.P.C. (3d) 189 (Ont. Ct. of Justice, Gen. Div.), the court considered a case where the written offer to settle was substantially different from the positions taken by the parties during negotiations, but the defendant had made an innocent mistake in that correspondence. The court found that the settlement agreement was not enforceable. The facts before us are completely different as the parties were present when the settlement terms were discussed and they signed the settlement. There is no suggestion before this Board that the terms of the settlement are at variance with what had been discussed. Rather, it is because other information has subsequently come to the attention of the responding party that it is now seeking to resile from the agreement reached.
- 22. In *Draper v. Sisson* (1991), 50 C.P.C. (2d) 171 (Ont. Ct. of Justice, Gen. Div.), the plaintiff's solicitor made a mistake in her acceptance of an offer to settle although all discussions prior to the acceptance had made clear her position on behalf of her client. The court would not permit the defendants to take advantage of the mistake of the plaintiff's solicitor. As outlined earlier, the facts of the case before the Board are clearly distinguishable.
- 23. Finally, in *Lowe v. Suburban Developers Ltd.*, [1962] O.R. 1029, the Court of Appeal upheld an award made based on findings of a lower court that the purchasers of a piece of property had been induced to purchase by fraudulent misrepresentations. The finding of fraudulent misrepresentations was premised on evidence of a brochure used by the developer, by the impressions

given by the developer's agent, and by covenants contained in the deed. In the case before this Board there is no evidence of fraudulent misrepresentation. At best, questions may not have been asked and so no information provided about what Mr. Whitford's plans were. It is clear that Mr. Whitford was present at the Board on the day the settlement was reached and it would have been possible for the responding party to have asked him what his intentions were if the responding party wished to ensure that all potential claims had been dealt with at that juncture. As outlined earlier, the information before the Board about the membership evidence is insufficient for us to make any findings of fraud, and in any event, would not have any impact on the settlement reached with Ms. Hahn.

24. In all of the circumstances of this case, and for the above reasons, we find that the responding party has breached the provisions of the settlement reached on October 19, 1994. The responding party is hereby ordered to comply with the terms of that settlement forthwith. The applicant knew the responding party was not going to comply with the settlement as early as October 21, 1994, however, there was no explanation given in the materials filed nor at the hearing of why this matter has taken so long to be brought to the Board's attention. We therefore decline to award interest on the amount outstanding.

1981-95-M Hank Brouwers, Applicant v. Canadian Union of Shinglers and Allied Workers, Responding Party

Construction Industry - Interim Relief - Unfair Labour Practice - Remedies - Applicant filing unfair labour practice complaint alleging that Shinglers' union bringing charges against him as result of his participation in other Board proceedings - Applicant in other Board proceedings alleging, amongst other things, that Shinglers' union not a "trade union" within meaning of the Act - Harm to applicant in perception of potential witnesses that applicant being singled out for punishment because of involvement in Board proceeding outweighing harm to union associated with restraint on conduct of internal union affairs - Board directing that internal union trial of applicant be postponed pending outcome of unfair labour practice complaint

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members F. B. Reaume and G. McMenemy.

APPEARANCES: Carolyn Hart and Hank Brouwers for the applicant; M. G. Horan and Robert Shewell for the responding party.

DECISION OF THE BOARD; September 5, 1995

1. This is an application for interim order under section 92.1 of the *Labour Relations Act*. The request for interim relief relates to a section 91 complaint in Board File No. 1980-95-U alleging the responding party has violated section 71 and section 82 of the Act. Sections 71 and 82 provide as follows:

^{71.} No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

- **82.-**(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,
 - (a) refuse to employ or continue to employ a person;
 - (b) threaten dismissal or otherwise threaten a person;
 - discriminate against a person in regard to employment or a term or condition of employment; or
 - (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

- (2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,
 - (a) discriminate against a person in regard to employment or a term or condition of employment; or
 - (b) intimidate or coerce or impose a pecuniary or other penalty on a person.

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

- 2. For ease of reference we will refer to the responding party as CUSAW.
- 3. The parties submitted detailed briefs and declarations. The Board reviewed the written material, the cases cited and the oral submissions and made the following ruling at the hearing on August 24, 1995:

"This is a bottom line oral decision with more detailed written reasons to follow.

The Board has considered all of the parties' submissions and we are persuaded that in these circumstances it is appropriate to make the follow interim orders:

- (1) the responding party is prohibited from proceeding with a trial of Hank Brouwers or any members of his crew, or firing, suspending or otherwise penalizing Hank Brouwers or any members of his crew in connection with a failure to pay back dues for years previous to 1995 pending the outcome of the section 91 complaint in Board File No. 1980-95-U; and
- (2) the responding party is ordered to post the Board's decision together with the Board's notice of the rights and protections afforded to union members under the Act and to witnesses and persons who initiate or participate in proceedings at the Ontario Labour Relations Board under the Act, at a prominent location in its office or offices where it will come to the attention of the union members.

This decision does not in any way reflect on the merits of the section 91 complaint or on the union's right to conduct its affairs pursuant to its constitution and bylaws."

- 4. The Board's reasons are set out below.
- 5. Hank Brouwers is one of the applicants in a number of proceedings before the Board

alleging CUSAW is not a trade union, that CUSAW is either an organization of employers or an organization dominated by employers, that CUSAW's agreements are void due to employer support, that CUSAW obtained membership evidence through intimidation, coercion and misrepresentation and if CUSAW is a trade union it has breached its duty of fair representation. There are allegations of harassment and intimidation with respect to a CUSAW membership meeting at the Howard Johnson Hotel on April 8, 1995. The above allegations are the subject of Board Files 0014-95-R, an application to terminate bargaining rights, 0013-95-U and 0214-95-U.

6. The decisions of the Board chaired by Vice-Chair Herman, dated May 19, 1995 and chaired by Vice-Chair Surdykowski, dated July 7, 1995, set out some of the troublesome history of the parties. Paragraph 4 of the Surdykowski decision of July 7th states:

This is far from a typical section 61 proceeding. Generally, such a proceeding simply involves an attempt by one or more employees to terminate a voluntary recognition or collective agreement between an employer and a trade union. However, this application has been brought against the backdrop of a general campaign by the Labourers' International Union of North America or one of its Locals to displace the CUSAW as the representative of persons engaged in the application of shingles and other roofing materials in new subdivisions in the residential sector of the construction industry, as defined in what purports to be a collective agreement between the CUSAW and a number of roofing contractors, in this case specifically Chislett Asphalt Roofing Ltd. ("Chislett") and Dominion Sheet Metal & Roofing Works ("Dominion") in Board Areas 8, 9, 18, 26 and 27. Further, in addition to alleging that the CUSAW is not entitled to represent the persons covered by the purported collective agreement(s), the applicants allege that the CUSAW was not a "trade union" within the meaning of the Labour Relations Act at the time the voluntary recognition agreements or collective agreements were entered into, and that it is not now such a "trade union" either, because it is an organization of or dominated by employers. In the alternative, the applicants allege that the CUSAW has received employer support from the roofing contractors, such that any agreement between the CUSAW and any such employer, specifically in this case Chislett and Dominion, should be deemed not to be a collective agreement for purposes of the Act, pursuant to section 49 of the Act.

- 7. The Herman decision directs the contractors to continue making all remittances required under the collective agreements and the administrator to continue to utilize the funds or payments as required under the various agreements and trust agreements.
- 8. Some of the following facts are not in dispute. Where there is disagreement on the facts the Board has set out the positions of the parties. Hank Brouwers has been charged under the union's By-Law No. 1. A trial was scheduled for August 11th and adjourned on agreement to August 25, 1995. The Trial Board would consist of six CUSAW members, three members chosen by Brouwers. In the event of a deadlock, Robert Shewell would cast the deciding vote. Robert Shewell is the President of CUSAW. The charges were brought by two members of CUSAW, Chris Rhynold and Chuck King. The charges were contained in two typed, identical letters, set up, it appears, as form letters with blank spaces as follows: member's name: _____ and C.U.S.A.W. Membership Card No: _____. These blank spaces were completed in handwriting indicating the name and card number. The letters were on blank paper and did not indicate any addresses. The letters were identical in content listing seven persons and amounts of outstanding union back dues from 1994. The applicant and the declarants (members of Hank Brouwers' crew) do not agree with this assessment.
- 9. It is agreed that Brouwers does not personally owe any back dues and that the persons referred to in the letters of July 13th were working on his crew. In response to questions from the Board CUSAW indicated that the employer, the crew leader and the individual are jointly and severally responsible for making sure dues are paid up to date and that members are in good standing. Article 4.01(a) of the collective agreement requires employees to maintain union membership

while working within the bargaining unit. The crew leaders are employees covered by the collective agreement.

10. The By-Law under Article 1 states:

1. MEMBERSHIP

- 1.1 Application for membership in the Union must be in writing and must be accompanied by an initiation fee of Four Hundred (\$400.00) dollars. Such membership may be indefinite in nature or limited in time intervals e.g.. a six month membership and upon such terms as may be determined by the Board from time to time.
- 1.2 Dues shall be paid commencing with the month in which application for membership is received. The amount of monthly dues shall be as set by the Board. Provided that monthly dues are received no later than the last day of the month to which they apply, a member shall not be considered delinquent.
- 1.3 Dues shall be calculated January 1st through December 31st and all back dues arising out of any year shall be paid by no later than January 31st of the following year, unless otherwise stated in writing by the Union.
- 1.4 As soon as a member becomes delinquent in his dues for more than six (6) months, he shall be automatically expelled from membership in the Union. Expulsion shall result in disqualification of all privileges and benefits in the Union including the right to work pursuant to a collective agreement with the Union and of the right to participate and vote in the proceedings in the Union. Reinstatement in the Union shall only occur when the said member pays all outstanding back dues as well as a new initiation fee.
- 1.5 For the purposes of this by-law "a member in good standing of the Union" shall mean a member who is not under suspension and who owes no dues, fines or other fees to the Union.
- 1.6 It is the sole responsibility of each member to know his current standing in the Union with respect to, but not limited to, back dues and benefit plan eligibility.
- 1.7 An additional amount of 4% of weekly gross payments from employers to members for work performed on or after April 1st, 1995 will be paid in respect of a cost of living adjustment. These amounts shall be remitted to the Benefit Plan Administrator and shall be paid to the member twice per year. Any member who is not in good standing at the time of the semi-annual payment will not receive his payment until all back dues are paid.

Article No. 5 of the By-Law provides:

5. TRIALS AND APPEALS

5.1 The basis for charge against any member or officer for which he or she shall stand trial shall consist of the following.

. . .

(10) Using the services of any suspended member or any non-member, with the exception of a non-member who is over 70 years of age.

. . .

(14) Such other acts and conduct which are inconsistent with the duties and obligations of a member of the Union including crew leaders failure to ensure that any person hired is a member in good standing.

. . .

- There is disagreement between the parties as to how the decision was made that back dues were owing. It appears some changes took place with respect to monthly dues. Harold Biso's declaration in paragraph 9 states that the members of CUSAW voted in 1994 to return the dues to \$520.00 per year (from \$400.00 per year). However, there do not appear to be any formal minutes recording this change.
- 12. The responding party denies that any intimation took place at the April 8, 1995 meeting or that Brouwers was prevented from speaking. Tom Biso, Business Representative of CUSAW, in paragraph 6 of his declaration denies that there was any violence or harassment stating:
 - . . . "If Brouwers and White were intimidated, it was due to the impact of their comments on the members and not due to anything initiated by myself or any of the Executive Board."
- 13. Tom Biso's declaration continues explaining his understanding of the back dues situation with respect to Brouwers' crew:

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June 16, 1995

- 7. At the request of the Executive Board I visited a job site on June 16, 1995 where Brouwers was working. My specific instructions were not to harass Brouwers or his crew, but to simply determine who was working on the job site. I complied with those instructions.
- 8. At the site members of Brouwers' crew told me that they hoped that they wouldn't be punished for what Brouwers was doing. I told them that no one was being punished, but CUSAW expected that back dues for all members would be paid.
- 9. Some of Brouwers' crew also told me that they did not want to work for Brouwers because of the way he had paid them in the past. I advised them that if they did not want to work as part of Brouwers' crew, CUSAW would try to get them work on another crew. This is no more and no less than CUSAW would do for any of its members who are out of work.
- 10. A number of Brouwers' crew still have not paid their back dues. As a result of what was said to Harold Biso, and my communications with them I believe they have not paid these dues because they are being threatened by Brouwers.
- ll. At no time did I threaten or harass Brouwers or any member of his crew.

August 2, 1995

- 12. I visited Brouwers' job site again on August 2, 1995. At this time, Brouwers advised me that he had told his crew members not to pay their dues until the Labour Board made its decision in the hearing of the applications described in paragraph 2.
- 13. I told Brouwers that the dues must be paid to maintain the status quo as required by the Labour Board. Brouwers told me that nothing would be done until we got a Labour Board decision.
- 14. To my knowledge to this date, Brouwers has refused to require his crew to pay their back dues and continued to use members who are not in good standing on his job sites.

Charges against Hank Brouwers

15. I have been advised that charges were laid against Hank Brouwers in good faith because members of CUSAW are angry that Brouwers continues to employ members who are not in good standing while a great number of members who are in good standing having paid their dues are not necessarily receiving work.

16. I believe that CUSAW has proceeded against Brouwers in good faith and that Brouwers will receive a fair trial on August 25, 1995.

. . .

- 14. Harold (Butch) Biso, Vice-President on the Executive Board of CUSAW in his declaration in paragraphs 12-16 explains what took place with respect to the back dues:
 - 12. In mid-January of 1995, each member of CUSAW working for a company subject to a CUSAW collective agreement received a notice inserted in their pay cheques which advised that all outstanding back dues must be paid in full by February 28, 1995. The notice also advised the members that if back dues remained unpaid, the member would not be in good standing and companies would be unable to supply the member with work. This Notice is attached as Exhibit 1 to my Declaration.
 - 13. At the end of January 1995, all companies who employ CUSAW members were further advised that as of February 28, 1995 all back dues for 1994 were to be paid and that if members did not pay, they would be considered "members not in good standing." The notice further advised the companies that non-members should not be working on the job site as both the company and the crew leader would be subjected to a fines and liquidated damages. This Notice is attached as Exhibit 2 to my Declaration.
 - 14. In the month of February 1995, each member of CUSAW was advised, on two occasions through notices inserted in their pay cheques, that the deadline for the payment of back dues was extended to March 31, 1995 due to the tough economic times. These Notices are attached as Exhibits 3 and 4 to my Declaration.
 - 15. It is CUSAW's practice to take sanctions against members who refuse to pay their back dues. In the past, this has included imposing fines upon members who continue to work but refuse to pay back dues.
 - 16. Generally, when a member receives notice of back dues owing, the member stops working until the back dues are paid. If back dues remain unpaid and the member continues working, fines and further sanctions may be taken.
- 15. It was agreed that this was the first trial ever scheduled by CUSAW. It was also agreed that only Brouwers was charged, not the members working on his crew. Brouwers himself did not owe any back dues. There are no submissions or documents showing that any grievances were filed against any of the employers regarding members who are not in good standing working on their jobsites.
- 16. Harold Biso in his declaration explained CUSAW's concern about laying charges in light of the ongoing hearings before the Board:

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- 19. Because of the ongoing hearings before the Labour Relations Board, CUSAW did not proceed against Brouwers except to advise him not to use those members of his crew who were not in good standing due to back dues owed to CUSAW. CUSAW advised Brouwers specifically which members of his crew owed back dues. However, despite this knowledge, Brouwers continued and continues to date to use members who are not in good standing in his crews.
- 20. Brouwers was again advised by myself and other members of the CUSAW Executive Board during the hearing before the Labour Relations Board to stop using members who are not in good standing in his crews.
- 21. On the day Brouwers brought his crew to the hearing, some of his crew told me that Brouwers had threatened them that if they paid their back dues, they would either be left home or

fired. Based on this information, I believe that the members of Brouwers crew fear for their jobs because of Brouwers control over their livelihood.

- 22. In July of 1995, two members in good standing, Chris Rhynold and Chuck King, came by the CUSAW office and asked what was up with Hank. As of this time, it was common knowledge within the membership that some of Brouwers' crew owed back dues, refused to pay them and flaunted this fact in the face of the Executive Board. CUSAW is a small organization and Brouwers had become notorious because of his flagrant disregard of CUSAW's rules.
- 23. These members expressed to me their concern that Brouwers was using members who were not in good standing on his job sites while other members who had paid all their dues were not receiving any work.
- 24. I advised these members that Brouwers' crew was still on the job site although some of them owed back dues. I further advised these members that the Executive Board had been reluctant to lay charges against Brouwers due to the ongoing hearing before the Labour Relations Board.
- 25. The response of these two members to this information was that they personally wanted to lay charges themselves, as individual members. Each member has this right under the CUSAW constitution.
- 26. As a result, in accordance with its Constitution and by-laws, CUSAW proceeded with charges against Brouwers. A copy of the by-laws is attached as Exhibit 5 to my Declaration.
- 27. To ensure that Brouwers would receive a fair hearing, CUSAW executive provided Brouwers with a formal charge statement and a trial date. Brouwers was advised of his right to appoint 3 persons to the 6 person trial board.
- 28. In response to a request from Brouwers' counsel, CUSAW accommodated Brouwers by agreeing to hold the trial at a neutral site, by providing Brouwers with particulars and be postponing the trial for two weeks.
- 29. I previously assured Brouwers and his counsel that the only persons in attendance at the trial will be those personally involved in the proceeding: the members of the trial board and any witnesses
- 30. CUSAW is not proceeding with this trial against Brouwers because of his involvement in proceedings before the Labour Relations Board. In fact, CUSAW deliberately declined to proceed against Brouwers, despite having the ability to do so under its by-laws, because of these proceedings. However, when compelled to proceed under its by-laws and the request of two members, CUSAW has done everything possible to ensure that Brouwers will receive a fair hearing.

. . .

- 17. It is Harold Biso's belief, after talking to Brouwers and his crew, that Brouwers assumes because of his involvement in Board proceedings that he can breach all of CUSAW's bylaws without any repercussions. Paragraphs 32 to 38 state:
 - 32. Examples of Brouwers flagrant conduct include comments made to the CUSAW executive including myself during a day of hearing at the Labour Relations Board by Brouwers' crew members that he had advised his crew that if they paid their back dues he would leave them at home or make sure that they were fired.
 - 33. Brouwers is very vocal in his defiance of CUSAW by-laws amongst his crew and the membership in general. As a result, it was common knowledge, that some of his men owed back dues and that he refused to allow his men to pay them.
 - 34. This is the first time in CUSAW history that a trial has been convened into charges laid by members. In all pervious cases, members paid up or complied with the by-laws of CUSAW so

that no trial was necessary. It is only Brouwers own continued failure to pay monies owed to CUSAW which has necessitated this trial.

- 35. The trial scheduled for August 25, 1995 has become critical given Brouwers constant attempts to attack the credibility and undermine the authority of the Executive Board.
- 36. CUSAW has proceeded with charges against Brouwers because of the order of Vice-Chair Herman of the Labour Relations Board dated May 19, 1995 which requires all parties to hearings before the Board to maintain the status quo.
- 37. In this case the status quo requires the payment of back dues owed.
- 38. Based on his own admission in the material filed, Brouwers does not deny that he has throughout the period from April 1, 1995 to date continued to use members not in good standing in his crew while other members have not received work.
- 18. Exhibit 4 of the responding party's brief is a notice which reads as follows:

TO BE INSERTED IN ALL MEMBERS PAY CHEQUES

THIS MEMO HAS BEEN PREPARED TO INFORM ALL MEMBERS THAT AS OF MAR 31/95 ALL OUTSTANDING BACK DUES MUST BE PAID IN FULL.

IF THE BACK DUES REMAIN UNPAID, THE MEMBER WILL NOT BE IN GOOD STANDING WHICH MEANS HE WILL NOT BE ELIGIBLE FOR BENEFITS AND COMPANIES WILL BE UNABLE TO SUPPLY HIM WITH WORK!!!

("Harold Biso")
Harold Biso, Vice President

- 19. In its interim relief application counsel for the applicant requests the Board to order CUSAW to delay the trial of Brouwers until the main application in Board File No. 1980-95-U alleging a violation of sections 71 and 82 of the Act has been decided. The applicant requests this relief only with respect to outstanding dues prior to 1995. The applicant is concerned that this trial may be perceived to be in retaliation for the complaints/applications filed by Brouwers and would affect the ability or willingness of witnesses to come forward to give their evidence in any of the proceedings. The applicant believes the charges and the trial are designed to interfere with his rights under the *Labour Relations Act*.
- 20. The responding party has a deeply felt concern that in the context of the proceedings before the Board and the raiding being conducted by the Labourers, it is critical that it can conduct its affairs without interference in what is an internal matter. The responding party asserts it would suffer labour relations harm if this interim order is granted. The responding party asserts this interim relief would prevent CUSAW from managing its membership and nullify a "crucial aspect of CUSAW's internal constitution." The interim relief, even a less restrictive interim relief, would affect the rights of all CUSAW members and would indicate that CUSAW lacks the ability to enforce its own by-laws and will be an invitation to employees in the collateral proceedings to flaunt the Board's status quo order as the responding party understands the Herman decision.

- The Board is aware that these are extremely troublesome times for all the parties. The Herman and Surdykowski decisions set out the difficulties the parties are facing and the uncertainty faced by the industry. The Herman decision deals with employer remittances and the necessity of the industry to continue to operate under the various collective agreements. It does not address the issue of dues owing from 1994. Vice-Chair Surdykowski in his decision comments on the proceedings by saying:
 - "...I am not overstating it when I say that the proceedings in this application to date have been fiercely adversarial, as evidenced by the number of objections, the comments and interjections which have been made, the manner and tone of these, and the emotional approach all parties have taken."...
- Charges were laid only against Mr. Brouwers notwithstanding the individual members own responsibility for their dues and the employer's responsibility to employ persons in good standing. Charging Brouwers only appears to be inconsistent with CUSAW's by-law paragraph 1.6 setting out the "sole responsibility of each member to know his current standing in the Union with respect to, but not limited to, back dues and benefit plan eligibility." Harold (Butch) Biso in his declaration in paragraph 13 describes how members are advised to pay back dues and if members do not pay they would not be in good standing and companies would be unable to supply them with work. Companies were advised that non-members ("members not in good standing") should not be working on the site as both the company and the crew leader would be subject to fines and liquidated damages. This information was conveyed by letter to all companies regarding outstanding back dues dated January 30, 1995 (Exhibit 2). Paragraph 15 of Harold Biso's declaration states it is CUSAW's practice to take sanctions against members who refuse to pay their back dues. It appears that no sanctions were taken against the members on Brouwers' crew. No sanctions appear to have been taken against the employer(s). If CUSAW wishes to maintain the status quo, as they understand the Herman decision, by requiring the payment of back dues owed, it seems somewhat puzzling that Brouwers who it is agreed does not owe any back dues, is the only one being charged. There are no sanctions or charges against the individuals who are alleged to owe dues prior to 1995 and the employers who are said to be employing members not in good standing. The Board does understand that in this industry the crew leader holds a unique position and recognizes that the crew leader bears some responsibility for ensuring the members working on his crew are "members in good standing". However there is no explanation as to why no action was taken against the employer(s) and the members who appear to be in violation of the collective agreement.
- 23. It is not clear from Harold Biso's reference in paragraph 34 of his declaration what monies are owed by Hank Brouwers. The declaration states "Brouwers continued failure to pay monies owed to CUSAW". It is agreed Brouwers does not owe any dues for 1994 and from the materials filed there do not appear to be any outstanding dues or fines owed by Brouwers personally.
- The applicant's concerns regarding the perception of potential witnesses that he (Brouwers) is being singled out because of his involvement in these Board proceedings is not unreasonable. Mr. Brouwers' apprehension, assuming his allegations in the section 91 complaint are true and provable, is not unreasonable. CUSAW's concerns with respect to their ability to effectively conduct their internal union affairs in light of a very difficult situation is not unreasonable. However, the potential harm to CUSAW does not outweigh the potential harm to the applicant in these circumstances.
- 25. This decision is not to be read by anyone that the Board will interfere with legitimate internal union matters. This interim order *only* postpones the trial until after the section 91 complaint is decided. It only affects Mr. Brouwers and his crew and only refers to dues prior to 1995.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

THIS NOTICE IS POSTED IN COMPLIANCE WITH A DIRECTION OF THE BOARD, ISSUED AFTER A HEARING IN WHICH BOTH THE APPLICANT, HANK BROUWERS, AND THE UNION HAD THE OPPORTUNITY TO MAKE SUBMISSIONS:

THE BOARD HAS DIRECTED THE TRIAL OF MANK BROUWERS BE POSTPONED PENDING THE OUTCOME OF THE UMPAIR
LABOUR PRACTICE COMPLAINT IN BOARD FILE NO. 1980-95-U FOR THE REASONS SET OUT IN THE ATTACHED DECISION.

IF THE BOARD FINDS THERE IS NO SASIS FOR THE COMPLAINT IN 1980-95-U THEN CUSAW IS FREE TO CONTINUE WITH THE TRIAL PURSUANT TO ITS BY-LAWS AND CONSTITUTION. IF THE BOARD DOES FIND A VIOLATION OF THE <u>LABOUR RELATIONS ACT</u> IN 1980-95-U IT WILL MAKE THE APPROPRIATE ORDERS AND DIRECTIONS.

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH THE PROTECTED BY LAW!

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BY AN EMPLOYER OR A TRADE UNION OR A REPRESENTATIVE OF AN EMPLOYER OR A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT INCLUDING ATTENDING A HEARING AS A WITNESS OR A POTENTIAL WITNESS.

IF AN EMPLOYEE IS PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO
ANYTHING FOR EXERCISING ANY OF THESE RIGHTS, A COMPLAINT MAY BE FILED WITH THE ONTARIO
LABOUR RELATIONS BOARD.

This is an official notice of the Board and must not be removed or defaced.

DATED THIS 6TH DAY OF SEPTEMBER, 1996.

3042-94-U Canadian Union of Public Employees, Local 94, Applicant v. The Corporation of the City of North York, Responding Party

Intimidation and Coercion - Remedies - Unfair Labour Practice - Union complaining that employer took certain steps (including refusing to reinstate grievor, contracting out certain services and imposing hiring and purchasing freeze) in response to arbitration award - Union alleging that employer seeking to intimidate employees and their union, and to circumvent effect of award - Board allowing application - Board making various orders, including direction that employer cease and desist from proceeding further with contracting out process initiated earlier - Employer also prohibited from initiating consideration of or contracting out services performed by bargaining unit members for further period of 6 months

BEFORE: Judith McCormack, Chair.

APPEARANCES: N. L. Jesin, A. Dale, B. Cochrane and N. MacKenzie for the applicant; Donald B. Jarvis, Evan Howard and Alan Wolfe for the responding party.

DECISION OF THE BOARD; September 19, 1995

- 1. On the agreement of the parties, the name of the responding party is amended to read: "The Corporation of the City of North York".
- 2. This is an application under section 91 of the *Labour Relations Act* in which the applicant union alleges that the responding employer has violated the *Labour Relations Act*. The gist of the union's complaint is that the City of North York took certain steps in response to an arbitration award at least in part to intimidate employees and their union, to retaliate against them, and to circumvent the effect of the award. These measures included refusing to reinstate a grievor, contracting out certain services, a hiring and purchasing freeze, the removal of an employee representative from one of the City's health and safety committees, and extensive attacks on the union by the Mayor in the media.
- 3. It is useful to make it clear at the start what this case is not about. The Board has not been asked to decide whether the City of North York has the right under normal circumstances to engage in activities such as to contracting out any of its services. Rather, there was no dispute that matters such as this would be normally governed by the collective agreement, the applicable arbitral caselaw and so forth. However, there are activities which may be lawful if done for the right reasons, and unlawful if they are illegally motivated. In this case, the issue before the Board is not whether the City would be generally entitled to conduct itself as it did, at least with respect to contracting out and freezing hiring and purchasing, but whether it did so to punish employees or their union for exercising legal rights, to intimidate them into refraining from exercising those rights, or to circumvent the effect of such rights. If the City was acting for those sorts of reasons, then its activities would violate the *Labour Relations Act*.

I. The Facts

4. These events date back to July of 1993 when Bernard Curtis, a labourer in the City's Public Works Department who was working as a garbage truck driver/loader was discharged. At that time, the City alleged that he had sold \$100.00 worth of hashish in the workplace. The union filed a grievance, and took the case to arbitration. After a nine day hearing, an arbitrator determined that Mr. Curtis should be reinstated with a suspension of eighteen months and subject to

certain conditions involving addiction rehabilitation and periodic drug testing. Mr. Curtis also eventually pleaded guilty to criminal charges of possession and trafficking.

- 5. There was considerable debate about the arbitration award during the course of these proceedings, much of which was not particularly useful with respect to the issues before me. Suffice it to say that the arbitrator considered the evidence before him in exhaustive detail, that there were significant issues of credibility on which he was required to reach findings, that the City's own approach to substance addiction played a significant role in his conclusion, and that an application for judicial review of the award was dismissed by the Divisional Court. Nowhere is it suggested in the award that using or selling drugs in the workplace is appropriate conduct for employees.
- 6. In any event, it was clear that the City took great exception to the award. It is worth noting that in making the findings of fact which follow, I have relied primarily on the evidence of the City's witnesses.
- 7. The City received the award on Thursday, November 10, 1994. The next day was a holiday, and there was some difference of opinion in the City's Human Resources Department as to whether the Mayor should be told about the award or not, at least until after the election which was to be held the following Monday. However, Alan Wolfe, the Commissioner of Public Works for the City, read the award over the weekend and spoke to the Mayor on Sunday. He testified that on his recommendation, he and the Mayor agreed to initiate consideration of contracting out of certain parts of the Public Works Department's activities. They also agreed that it did not make sense to hire employees and purchase equipment while they were considering contracting out, although as it turns out there has been at least one employee hired and some purchasing since then.
- 8. On the Monday following the weekend, the City issued the following notice to the union:

Re: Contracting Out of Public Works Services

This is to notify you that the Public Works Department intends to recommend to Council the contracting out of the following services:

- 1. Garbage Collection for Solid Waste West (Ingram)
- 2. Household Blue Box Recycling
- 3. Apartment Recycling
- 4. Apartment Garbage Collection
- 5. Grass Cutting
- 6. Sidewalk Snow Clearing
- 7. Emergency Response for After Hours Sewer and Watermain Repairs

This is to provide you with the required notice under the Collective Agreement. Please prepare any proposals within the time allocations established within the Collective Agreement.

- 9. The collective agreement between the parties stipulates that such a notice be given before there can be contracting out. The Ingram yard is one of three yards involved in solid waste collection. The other yards were not the subject of the contracting out notice. Mr. Curtis works at the Ingram yard. Mr. Wolfe told the Board that it was the Curtis award that had precipitated the issuance of the contracting out notice.
- 10. On the same Monday, Mr. Wolfe called all the directors and superintendents together and told them that the City would be taking every legal step it could to have the award reversed, and that it was considering contracting out as a result of health and safety concerns relating to the

award. The union alleges that on Monday as well, George McClusky, the superintendent of the Bermondsley yard, told employees in the Bermondsley yard that they had cut their own throats with the Curtis award and that it was just a matter of time before their jobs would be contracted out. Mr. McClusky denied making such a statement and testified that he did not talk about the arbitration award with employees, although he did talk about an article in the paper which addressed contracting out because of an employee's drug conviction.

- The following day, Bruce Shaw, Co-Chairperson of the City's Joint Health and Safety Committee, David Beatty, the Safety Supervisor for the Public Works Department, and Mr. Wolfe met and discussed the award. Mr. Wolfe expressed the concern that the award would have an adverse effect on substance abuse in the workplace and that the best way of dealing with it would be a Joint Health and Safety Committee meeting. He said that he would like the meeting to happen as soon as possible and would allow employees time off work for the meeting. A special meeting of the Joint Health and Safety Committee was then scheduled for the following day. It was undisputed that such a special meeting had never been called before, even where fatalities had occurred.
- Mr. Shaw opened the meeting by saying that it was confidential and that no minutes would be kept other than the recommendations that the Committee put forward. This was an unusual course of action as well. Mr. Shaw then told the meeting that Mr. Wolfe wanted the Committee to discuss the effect on the workplace of reinstating a drug trafficker, and some discussion of the arbitration award ensued.
- Ron McDonald, an employee member of the Committee, objected to such discussion as being inappropriate and said that he would have to leave the room if the award was discussed. Because the conversation circled around to the award several times, Mr. McDonald made similar comments on three occasions. At one point Ross Petrini, the Fleet Manager for the Public Works Department and a management member of the Committee, advised the Committee that Mr. Wolfe was mad because of the recent arbitration decision and that he was talking about contracting out all of the garbage collection because of the decision. Mr. McDonald objected to this remark as well.
- 14. Mr. Petrini told the Board that Mr. Shaw gave an overview of the Curtis award at the meeting. He denied, however, that the Committee was asked to say that the award was wrong, in contrast to Mr. McDonald's testimony. Nevertheless, the Committee reached agreement on the following three recommendations:

This Committee does not condone and never has condoned the use of drugs and alcohol in the workplace.

We recommend a joint venture between Union and Management to implement a more progressive system to recognize and dealt with substance abuse.

The result of any arbitration findings is not within the jurisdiction of this Committee to agree with or refute.

(emphasis added)

15. After the meeting, Mr. Wolfe became aware that Mr. McDonald had objected to discussing the arbitration award. It also came to Mr. Wolfe's attention that Mr. McDonald was an alternate member of the Committee, and that Tony Tucci was the regular representative. Both were present on November 16, 1994. Mr. Wolfe decided that the City would allow only one to be present in the future, although he did not decide which one. Tony Garafolo, a superintendent, told

Mr. McDonald about two weeks after the meeting that word had come down from upper management that either he or Mr. Tucci could attend the meetings, but not both. Mr. Wolfe did not take action on the joint venture recommendation made by the Committee because he felt that it would not work.

- 16. Subsequently, the Mayor made a number of strong statements to the media about the award and the union. The parties agreed that the media accounts of both the descriptions of his views and his quoted statements were accurate. The following are excerpts for those accounts.
- 17. An article in the Toronto Star on November 17, 1994 headed "Lastman Revives Garbage Debate" included these paragraphs:

Mayor Mel Lastman served notice during his election victory party Monday night that the city may contract out garbage collection to private companies.

The proposal has popped up during previous council meetings but has been turned down.

What concerned Lastman on an evening when he might have been celebrating his massive victory was a recent arbitrator's ruling that forced the city reinstate a works department employee who was caught allegedly selling \$100 worth of drugs.

"The police caught him red handed," Lastman said. "The union appealed it and the arbitrator said we had to hire the guy back."

Lastman said he is asking for a judicial review as well an investigation by the provincial labor ministry.

And he said he is going to look into farming out waste collection, "because if the union wants us to keep hiring drug users and drug pushers, I have no use for the union."

He said he will ask council next month to look into contracting out some services.

"And in the meantime, there will be a freeze on hirings and vehicle purchases."

18. On CFTO News on November 23, the Mayor is described as making these comments:

North York Mayor Mel Lastman is fuming over a labour decision he says forces him to keep drug traffickers on the City payroll.

"There's a million people out there looking for work. I don't have to keep drug traffickers working here at North York."

North York Mayor Mel Lastman says he's had enough of unions. A provincial arbitrator says the City must give a sanitation worker back his job even though the worker was convicted of drug charges while on the job.

"This is crazy. This union, this management of the union, Local 94, are working in the past and they've got to come up to speed. They're defending drug pushers."

19. On November 24, 1994, the Toronto Star ran another story titled "Lastman Takes Steps to Privatize Garbage" which included the following paragraphs:

North York is taking the first steps toward contracting out garbage collection.

This comes in the wake of a recent arbitrator's order for the City of North York to rehire an employee convicted of possession of drugs.

Mayor Mel Lastman has asked works commissioner Alan Wolfe to get prices from companies for waste collection, including:

- One-third of curbside pick-ups.
- The remaining one-quarter of apartments. Three-quarters of apartments in the city now have their garbage collected by private contractors.
- · All recycling.

Last year, the works department received a letter from an employee in one of the city's yards expressing concern about his safety because there was some drug use and selling going on, Wolfe says.

An undercover police officer arrested a worker and charged him with possession for the purpose of trafficking.

The man pleaded guilty to a lesser charge of simple possession, Wolfe says. He received 12 months probation and was ordered to do 40 hours community work. Then the arbitrator ordered the city to re-hire him.

The man has not yet asked the department about coming back to work, Wolfe says.

"This is crazy," Lastman said. "The guy was driving a garbage truck. I don't want a guy, driving 10 tonnes of garbage in one of our vehicles, who is a drug trafficker."

The city wants a judicial review of the arbitrator's decision, he said.

Lastman says he will formally ask city council next month to study contracting-out of some works department services.

"And in the meantime, there will be a freeze on hirings and vehicle purchases," he said.

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There are 150 workers involved in collecting waste and Wolfe doubts privatizing would mean layoffs.

20. The following day in the Toronto Sun, an article headed "Dealer is Out, Mel Says" contained these paragraphs:

North York Mayor Mel Lastman is just saying 'no' to a union demand that the city rehire a trash worker nabbed drug trafficking on the job.

And the outraged mayor believes the latest showdown with garbage collection labour bosses could push in a privatized system within 60 days.

"No. . . way — the guy was charged and convicted and we're not about to hire back drug traffickers to drive around 30-ton garbage trucks," he said of a provincial arbitrator's ruling the fired worker be put back on the job.

The trash collector was nabbed by an undercover drug officer in June 1993, after the five-year city employee handed over \$100 worth of hashish while at work.

Lastman, who is calling for a judicial review of the arbitrator's decision, said the city is getting quotes on private haulers and could privatize one-third of collections and all recycling work.

21. Another story in the Toronto Star on December 1 with the headline "Lastman Warns Union to Halt 'Nonsense Grievances'" contained the following excerpts:

North York will look at more than contracting out garbage collection if the union doesn't stop filing "nonsense grievances," Mayor Mel Lastman says.

Still seething from a recent arbitrator's decision that told the city's works department to rehire an employee convicted of drug trafficking, Lastman said he may look at other areas to privatize to cut taxes.

"There could be more, because if they're (the union) going to push us, we're not going to sit still because we cannot keep raising taxes. And we're not going to keep hiring more people."

The employee was charged with possession, trafficking and possession for the purposes of trafficking hashish, but pleaded guilty to simple possession and trafficking.

A labour ministry arbitrator ordered the works department to reinstate the worker and the city plans to ask for a judicial review of the decision.

Meanwhile, Lastman will ask city council to look into privatizing garbage collection, including one-third of curbside pick-up, the remaining one-quarter of apartment collection not picked up by private contractors and all recycling.

"I have never, never talked privatization before," he said. "Other members of council have, but the words have never come from my lips before.

"I'm prepared to go ahead with this if the union doesn't start moving. And I'm not hiring back drug traffickers."

Lastman said he's also bothered by what he calls nonsense grievances from union management.

One city official projected that 100 grievances will be filed by Local 94 of the Canadian Union of Public Employees by Dec. 31.

Lastman said the union complained when the city sent out one person to pick up a dead skunk, instead of two people.

"We want to plant a \$32 tree but we can't just send a truck driver to plant it," he added. "They (union management) want us to send three people to plant it."

He also said that a caretaker in a community centre can clean a toilet, but can't change a light bulb. He must call in a handyman.

"We can't operate this way any more," he said. "All they do is grieve and grieve and they have us in front of the arbitrators constantly. And we're fed up with it."

22. The North York Mirror printed the following article in its weekend edition on November 19 and 20th titled "Lastman Fuming After Drug Dealer Gets City Job Back":

An arbitrator's decision to hand a North York sanitation worker back his job after he was convicted of dealing drugs could lead to the privatization of garbage collection, Mayor Mel Lastman warned.

"We're going to appeal it," fumed an angry Lastman at his election night victory party Monday. "I'm going to put a freeze on all equipment purchases, and I'm going to look at hiring out. If the unions want us to have drug-users on the job, I want no part of the union."

Lastman said he's also asking for a judicial inquiry into the provincial arbitrator's decision

requiring the city to hire back the worker, who was arrested in June of 1993 following a police investigation of the city's works department at Lastman's request.

According to Works Commissioner Alan Wolfe, an undercover investigator purchased \$100 worth of hashish from the employee, and charged him with possession of a narcotic for the purposes of trafficking. In court, the employee plea-bargained down to simple possession.

But the provincial arbitrator, who rendered his decision the previous week, didn't buy the police officer's testimony and ordered the city to reinstate the employee, who had been working as a driver on one of the city's fleet of garbage trucks.

Wolfe said the arbitrator's decision will make it more difficult for the city to ensure safety for both its employees and the public.

"This work can be very dangerous," said Wolfe. "I'm sure there are more injuries tabulated for garbage trucks than there are in police cars."

And he was critical of the union for bringing the matter to arbitration in the first place.

"We're not saying they should not look at injustices, but whenever there's a problem they don't have to take everything to arbitration."

But CUPE Local 94 President Brian Cochrane said the union was simply fulfilling its obliga-

"If he's upset, the reality is that we have an obligation under the collective agreement to represent our members, and we fulfilled that obligation," said Cochrane. "The city put their case forward, we put our case forward, and the arbitrator rendered a decision. That decision puts this person back to work - but this guy's been off the job for 18 months, and that is a significant penalty to impose on someone."

Lastman said he will bring forward the move to privatize garbage collection to council in December.

23. In its December 3-4 edition, the Mirror ran a story which included the following paragraphs:

Negotiations on the [reorganization] plan, which would alter the City's collective agreement with its workers, resumed last week. But Lastman said the plan is the only way the City can restructure to deliver services in a cost effective way.

"Right now one of our zamboni drivers cleans rinks but he can't change a lightbulb," said Lastman. And most of their members would get a raise. Yet their leaders are making it impossible."

Lastman's promise to privatize comes on the heels of a successful appeal by the union that required the city to hire back a worker who was convicted of trafficking and possession of marijuana while on the job driving one of the city's garbage trucks.

The city is calling for a judicial review of the arbitrator's ruling, and Lastman has asked the works department to explore privatization of garbage collection.

"Fighting for drug traffickers is nuts," said Lastman. "Who's going to watch this guy when he comes back?"

But in a press statement issued November 29, CUPE leadership accused Lastman and other city officials of exploiting the situation.

"The mayor's response to this decision is purely retaliatory and is being pursued for political reasons and at a great emotional and potentially financial cost to innocent employees," read the statement.

24. The parties also agreed that the Mayor made these statements in his inaugural address on December 7, 1994:

We will require keen cooperation from all our departments, our employees and unions.

But - while we favour cooperation - this council is *not* adverse to iron-fisted bargaining if necessary to obtain the level of cost-efficiency and high standards that our citizens expect.

At the top of my personal list is to resist any attempts by out-of-touch provincial arbitrators to force our city to keep convicted drug traffickers on our staff. We should insist on maintaining honest and law-abiding employees who are drug-free.

I also feel that our workers should do a wider range of jobs. Here's something that desperately needs to be changed. There was a dead skunk on the road. It was unsightly and smelled bad, naturally, there were complaints.

We sent out one person as quickly as possible to remove the skunk. The union grieved. . . why? Because we didn't send out two people. How many employees does it take to remove one dead skunk? That's like asking how may employees does it take to change a lightbulb.

It makes no sense to send to people when one is sufficient. Our citizens cannot afford such luxuries.

We need people on our staff who are willing and able to broaden their skills to handle a variety of jobs. This is a concern, particularly in our parks department, where we have 21 categories and this must be reduced to 15 at the most.

Our citizens cannot afford a workplace of janitorial specialists.

We will be seeking cooperation from our union, but will not back away from confrontation.

- 25. The City refused to reinstate Mr. Curtis following the issuance of the award. It asserted that Mr. Curtis had not complied with the conditions necessary for reinstatement, while the union took the view that Mr. Curtis had fulfilled all those conditions and that the City's refusal was specious and based on other reasons. The union brought the matter back before the arbitrator for implementation, and on January 12, 1995, he again ordered the City to reinstate Mr. Curtis forthwith. In the meantime the City had filed an application for judicial review, and it continued to refuse to take Mr. Curtis back. Mr. Wolfe explained this by saying the City was thinking of obtaining a stay of the award pending the court proceedings. On February 13, the judicial review application was dismissed. The City reinstated Mr. Curtis shortly thereafter.
- 26. It is this sequence of events that the union alleges constitutes a series of unfair labour practices. More specifically, it cites the City's initial refusal to reinstate Mr. Curtis, the decision to initiate the contracting out process, the hiring and purchasing freeze, the barring of Mr. McDonald from the Joint Health and Safety Committee meetings, the alleged statement by Mr. McClusky and the statements by the Mayor in the media as forming the basis of extensive violations of the Act.

II. The Law

- 27. Sections 3, 65 and 67 of the *Labour Relations Act* provide as follows:
 - 3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.
 - 65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or

administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

- 67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
 - (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
 - (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
 - (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
- 28. These provisions are located within a scheme of collective bargaining which includes an enforceable collective agreement as its centrepiece. Among other things, section 15 of the Act requires parties to bargain in good faith and make every reasonable effort to reach such an agreement, which becomes binding upon the parties under section 51. Strikes and lockouts are prohibited during the life of the collective agreement by section 74, and it is generally accepted that the dispute resolution system provided by the grievance and arbitration procedure is the *quid pro quo* for that ban. Without such a mechanism, there would be no meaningful way to administer the provisions of a collective agreement. In fact, so fundamental is this process that section 45 of the Act deems an arbitration procedure into all collective agreements, provides an extensive coda with respect to arbitration proceedings and stipulates that arbitration awards are binding and enforceable. Looking at this scheme as a whole, it is evident that if arbitration does not function as an effective method of resolving collective agreement disputes, the viability of a collective bargaining regime may be correspondingly undermined. (See, for example, *London Salvage and Trading Company Limited*, [1991] OLRB Rep. Nov. 1291.)
- 29. This is not to suggest that the process is free of controversy. Arbitrators are often faced with difficult or fractious cases where there may be more than one reasonable outcome or even none at all. The nature of a conflict resolution process means that parties can be highly polarized in their positions and find it difficult to reconcile themselves to an unfavourable result. However galling such an award may be to an unsuccessful party, it is worth remembering that the alternative, where disputes are settled by strikes or other forms of collective action, is usually even less palatable.
- 30. The statutory context provided by the *Labour Relations Act* makes it clear that filing and arbitrating grievances fall into the categories of both the lawful activities of a trade union and the administration of a union, and that they constitute the exercise of rights protected under the provisions set out above. Of course, there are some circumstances in which an employer may rearrange its affairs following the issuance of an arbitration award to accommodate or respond to the award without impinging on those rights or breaching the law. At the same time, if its conduct amounts to an attempt to circumvent or resist the effect of the grievance and arbitration process or to retaliate against or intimidate employees or their union, that conduct will constitute a violation

of the Act. And if the employer's motives are mixed in this respect, the Board's long-standing approach is that its activities will breach the Act if even one of the reasons for the impugned conduct is unlawful. (See, for example, *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450).

III. The Decision

- 31. The City's first argument in this case was that the Board should defer to an arbitrator with respect to the City's refusal to reinstate Mr. Curtis and its decision to initiate the contracting out process. In considering whether to defer to another forum in which there is concurrent jurisdiction, the Board starts from the proposition that its task is to exercise the powers conferred upon it by the Act. As a result, it is up to a party arguing for deferral to persuade the Board that there are good reasons why the Board should not apply its jurisdiction in the usual manner. Within this broad context, the Board looks to the kind of factors outlined in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254.
- 32. The circumstances before the Board suggest that deferral of the City's refusal to reinstate Mr. Curtis makes some sense. Both the City's position that Mr. Curtis had not fulfilled the conditions of the award and the union's response that this was entirely specious were argued before the arbitrator, who dealt with the matter by again ordering Mr. Curtis' reinstatement. Since Mr. Curtis has now in fact been reinstated, there is little to be done by way of remedy, and the arbitrator is not only in a better position to address this issue but has already done so. In this somewhat unusual situation, deferral to the arbitrator appears appropriate.
- 33. The same cannot be said with respect to the decision to initiate the contracting out process. While the issue of contracting out is touched upon in the collective agreement between the parties, the matter before the Board is not a contractual dispute or an allegation that the City has violated the collective agreement. Indeed, it does not appear that arbitration proceedings in this regard had even been initiated at the time of the hearing. Rather, the allegations involve a pattern of conduct which the union argues breaches the *Labour Relations Act*, whether or not it is permitted by the collective agreement. In other words, the matter involves issues which are not congruent with those at arbitration, and remedies which are not available in those proceedings. Applying the Board's traditional criteria set out in *Valdi Inc.*, *supra*, this is not a suitable matter for the Board to defer to another forum.
- As a result, it is useful to turn at this point to the decision with respect to the contracting out process. The City advanced several reasons for its decision in this regard. Mr. Wolfe told the Board that he and the Mayor agreed to initiate consideration of contracting out because of health and safety concerns relating to the award, for financial reasons and because of factionalization in the Ingram yard. As noted previously, Mr. Wolfe agreed that the issuance of the contracting out notice was precipitated by the Curtis award, although he said that the City might issue a notice such in the future as a result of budget considerations. However, he also agreed that even if it turned out that contracting out did not cost less, the City would still be considering contracting out because of the award.
- 35. The primary health and safety concern that Mr. Wolfe described to the Board was that he felt the award conveyed a message of leniency towards employees trafficking or using drugs in the workplace, and that the eighteen month suspension, addiction rehabilitation and periodic drug testing imposed were not sufficient deterrents to other employees. In his view, dismissal was the appropriate response. His concern was that employees previously not involved in selling drugs might start to do so because of the award. He acknowledged that the arbitrator had concluded that the City had failed to demonstrate that the grievor was a dealer of illicit drugs in the workplace, but testified that he disagreed with the facts as found by the arbitrator.

- Mr. Wolfe acknowledged as well that under the City's Employee Assistance Plan, the City had entered into agreements that were similar to the award with respect to employees who had come forward or were caught using drugs and alcohol. These included employees reinstated to driving positions. He admitted that if the facts as determined by the arbitrator were accepted, the award was not very different from those agreements with respect to the kind of message conveyed to employees.
- While Mr. Wolfe allowed that the undesirable message of the award would affect all three solid waste yards, he explained that the City had singled out the Ingram yard for contracting out because it had the smallest number of employees and because of the factionalization described below. The Ingram yard has fifty-three employees, while the Finch and Bermondsley yards have fifty-nine and sixty-nine employees respectively.
- A related concern expressed by Mr. Wolfe was that the award might lead to more driv-38. ing convictions and accidents which might in turn have an impact on the City's Commercial Vehicle Operation Registration licence. The City at one point received a letter from the Ministry of Transportation which cited an excessive accumulation of accidents involving the City's fleet, and indicated that failure to take corrective action might result in discussions with the Ministry. The Board was told that one sanction the Ministry could impose was to remove the plates of vehicles operated as part of the City's fleet. However, Mr. Wolfe agreed that the correspondence following this letter indicated that the City had met the Ministry's requirements. He did not know how close the City had come to sanctions, nor did he check Mr. Curtis' accident record. He also testified that the City does not consider this problem when reinstating rehabilitated employees who have had drug or alcohol problems to driving jobs. Contracting out would alleviate Mr. Wolfe's concern because the City would no longer have to maintain a fleet. There was no dispute, however, that the City was only considering contracting out solid waste collection at the Ingram yard. Mr. Wolfe agreed that as a result of provisions in the collective agreement between the parties which prevented employees from being laid off as a result of contracting out, Mr. Curtis would be transferred to one of the other yards if the Ingram yard work was contracted out.
- Mr. Wolfe also told the Board that he was apprehensive both about potential damage to the trucks, and public liability. This latter concern stemmed from a duty to protect the public which he felt involved both financial liability and a moral obligation. Again, he did not explain why these problems would not be considered when reinstating employees with drug or alcohol problems under the Employee Assistance Plan agreements, nor how contracting out would be a solution if the result was that Mr. Curtis would simply be driving at another City yard.
- 40. The issue of factionalization related to a particular employee who felt that he had been identified as an informant with respect to drug use and who was being harassed and threatened, he believed, by other employees. However, the employee in question testified that the problems he experienced for the most part occurred before April of 1994. He had been offered a transfer to another location but declined to accept it because he felt that he had done nothing wrong and the City could not guarantee that he would be paid at the same wage level. Mr. Wolfe agreed that he had taken no other steps to address any factionalization aside from considering contracting out.
- The financial concerns Mr. Wolfe cited included social contract savings targets, declining City revenues and an anticipated reduction in subsidies. He told the Board that the cost of contractors in other municipalities was less than the City was currently paying for garbage collection, although he clarified that this was at least partly because a different level of service was involved in terms of frequency of collection. In cross-examination, Mr. Wolfe testified that the City had not calculated how much it would save by contracting out, either before or since he had sent the con-

tracting out letter, but felt that savings were feasible. He acknowledged that the City had reached an agreement with the union in 1994 with respect to contracting out some items such as apartment garbage collection which were also contained in the notice of November 14, 1994. That agreement was in effect until May of 1995. Mr. Wolfe admitted that if the City actually contacted out those items during this period, it would be in violation of that agreement, but he felt the notice of intention to contract out did not. Mr. Wolfe also testified that in addition to the provisions in the collective agreement preventing employees from being laid off as a result of contracting out, he had advised management members that none of them would lose their jobs either. When asked how the City would save money paying a contractor in these circumstances, he indicated that they expected to realize savings as a result of the attrition of bargaining unit members.

- 42. The City led evidence with respect to a lengthy process for contracting out which may be roughly summarized as follows. The process can be initiated in several ways, including by means of a report from the Commissioner of Public Works. The issue would then be placed on the agenda of the Public Works Committee which includes five members of City Council and the Mayor in an ex officio capacity. This results in a report which goes to Management Committee, composed of five members of council and chaired by the Mayor. The report from this Committee then goes to City Council. If Council decides to contract out, tenders are accepted and analyzed and a report prepared with respect to whom the contract should be awarded, which is considered by Management Committee and then Council. The Commissioner of Public Works would then take the necessary steps for the actual contracting out. This process can take up to twenty-four weeks. At the time of these hearings, the matters referred to in the November 14th notice were only at the Public Works Committee stage.
- Dennis Kelly, the City Clerk, told the Board that Council had the power to contract out without going through this process. In addition, if the Mayor decided on his own to solicit tenders or a proposal for contracting out, Council could simply adopt this approach. Motions made by the Mayor, he testified, like those of other Councillors, are usually carried. However, Mr. Wolfe told the Board that first-time contracting out initiatives have never short-circuited this process. He also testified that contrary to the Mayor's statements, the City had not received or solicited any tenders. Nevertheless, this was the first time that a notice of intention to contract out has been sent even before the Public Works Committee stage of the process.
- 44. Mr. Wolfe also told the Board that he thought the union was wrong to take Mr. Curtis' grievance to arbitration. He did not deny that he realized the November 14th notice would cause concern to the union and its members, but testified that they were aware that there was a long political process in which they could show City Council that they were willing to co-operate with controlling drugs in the workplace.
- 45. There is no doubt that the City has taken a strong stand against alcohol and drug use in the workplace, and that this policy forms part of its training program for employees. At the same time, the City also takes a relatively sophisticated approach to employees experiencing these problems, including an active Employee Assistance Program. The concerns expressed by Mr. Wolfe with respect to the award are difficult to reconcile with the City's willingness to reinstate employees with a history of drug or alcohol abuse to driving jobs. Of course, such reinstatement would only occur with proper safeguards in regard to respect to rehabilitation, testing and so forth, but these are similar to the conditions set out in the Curtis award. As a result, the issues of potential damage to equipment, the City's commercial vehicle license, and public liability or public risk relating to Mr. Curtis' reinstatement would apply to a similar extent to the employees maintained or reinstated under the Employee Assistance Plan as well. The City distinguished Mr. Curtis' case by saying that he had been trafficking in drugs, as opposed to simply using them. However, as

noted earlier, Mr. Wolfe conceded that if the facts were as found by the arbitrator, the situation was not very different from those addressed under the Employee Assistance Plan. It is also not obvious that a driver who sells hashish, however one might disapprove of such conduct, is more likely to have traffic accidents than one who uses it. Moreover, it is not clear how contracting out the Ingram yard would address any of these problems, since Mr. Wolfe conceded that Mr. Curtis would likely be transferred to one of the other yards.

- 46. In essence, both Mr. Wolfe and Mayor Lastman strongly disagreed with the award because they felt that it was too lenient, and that the appropriate decision would have been in line with the City's original course of action, that is, dismissal. Much of what the City argues now as health and safety concerns are restatements of those views, and their reasons for those views. However, much of this could have been or was in fact put before the arbitrator who decided otherwise. Indeed, the arbitrator specifically addressed the issue of the "message" the award might convey in his decision (and incidentally commented in several parts of the award on the seriousness of the grievor's conduct and the fact that it merited discipline). In these circumstances, the argument that it was not the award itself that prompted the City's conduct but health and safety concerns stemming from the award appears to be an exercise in hair-splitting.
- As noted previously, Mr. Wolfe also told the Board that regardless of whether contracting out represented a cost-saving, the City would still be considering this course of action because of the Curtis award. In other words, the financial considerations were not determinative in the decision to initiate the contracting out process. Presumably this is reflected in the fact that the City had not analyzed how much money would be saved by contracting out either before or after the notice was issued, and in the financial implications of retaining both the City's employees and managerial staff while at the same time paying a contractor. Of course, it is evident that the contracting out process described above is in part to provide this kind of information and analysis. Nevertheless, to the extent that the financial considerations played any role, the apparent indifference by the City as to whether or not contracting out would represent a cost-saving at the point at which the notice was issued tends to undermine the credibility of the financial reasons advanced for it.
- 48. The evidence about factionalization indicated that there was some minor harassment of one employee at work. While he testified that he also received threats at home, there was no evidence whatsoever connecting such threats to any other employee. In any event, the City did not seem to take the problem very seriously for many months before the award. Where it concerned itself so little with the matter previously, it seems unlikely that it would suddenly become important enough to warrant the fairly dramatic step of contracting out. The fact that the employee in question had declined a transfer and that the last incident he described was a considerable time before the issuance of the award also suggest that this issue had a relatively remote relationship to the contracting out decision. (Where there was a conflict in the evidence between Mr. Wolfe and the employee in question with respect to dates and incidents, I have relied on that of the employee who had first hand knowledge.) Again, it was also unclear how contracting out would address this problem in any event. In light of the collective agreement provisions, it appears that the individual concerned might end up continuing to work with the same employees, albeit in a different yard.
- 49. In summary, then, the reasons advanced for the City's decision with respect to initiating the contracting out process are not supported by even its own evidence.
- 50. In contrast, the Mayor's statements present a different picture. While they must be read in context, the following are some indicative excerpts:

And he said he is going to look into farming out waste collection, "because if the union wants us to keep hiring drug users and drug pushers, I have no use for the union."

* * *

"This is crazy," Lastman said. "The guy was driving a garbage truck. I don't want a guy, driving 10 tonnes of garbage in one of our vehicles, who is a drug trafficker."

* * *

North York Mayor Mel Lastman is just saying 'no' to a union demand that the city rehire a trash worker nabbed drug trafficking on the job.

And the outraged mayor believes the latest showdown with garbage collection labour bosses could push in a privatized system within 60 days.

"No . . . way - the guy was charged and convicted and we're not about to hire back drug traffickers to drive around 30-ton garbage trucks," he said of a provincial arbitrator's ruling the fired worker be put back on the job.

* * *

North York will look at more than contracting out garbage collection if the union doesn't stop filing "nonsense" grievances," Mayor Mel Lastman says.

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"I have never, never talked about privatization before," he said. "Other members of council have, but the words have never come from my lips before.

"I'm prepared to go ahead with this if the union doesn't start moving. And I'm not hiring back drug traffickers."

"We can't operate this way any more," he said. "All they do is grieve and grieve and they have us in front of the arbitrators constantly. And we're fed up with it.

An arbitrator's decision to hand a North York sanitation worker back his job after he was convicted of dealing drugs could lead to the privatization of garbage collection, Mayor Mel Lastman warned.

"We're going to appeal it, "fumed an angry Lastman at his election night victory party Monday. "I'm going to put a freeze on all equipment purchases, and I'm going to look at hiring out. If the unions want us to have drug-users on the job, I want no part of the union."

* * *

And he [Wolfe] was critical of the union for bringing the matter to arbitration in the first place.

"We're not saying they should not look at the injustices, but whenever there's a problem they don't have to take everything to arbitration."

"Fighting for drug-traffickers is nuts," said Lastman. "Who's going to watch this guy when he comes back?"

At the top of my person list is to resist any attempts by out-of-touch provincial arbitrators to

force our city to keep convicted drug traffickers on our staff. We should insist on maintaining honest and law abiding employees who are drug-free.

"There's a million people out there looking for work. I don't have to keep drug traffickers working here at North York."

North York Mayor Mel Lastman says he's had enough of unions. A provincial arbitrator says the City must give a sanitation worker back his job even though the worker was convicted of drug charges while on the job.

"This is crazy. This union, this management of the union, Local 94, are working in the past and they've got to come up to speed. They're defending drug pushers."

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"Right now one of our zamboni drivers cleans rinks but he can't change a lightbulb," said Lastman. And most of their members would get a raise. Yet their leaders are making it impossible."

The worker was fired after an undercover investigation into drug trafficking in the City works department. The union grieved the issue and it went to an arbitrator. Lastman received word of the arbitrator's decision on November 14th, and he's so fed up he wants to privatize garbage collection. Lastman says the City of North York will appeal the arbitrator's decision. In the meantime, he says he's already begun taking tenders for the contracting out of some garbage work.

- It is clear both from these statements and the other evidence that Mayor Lastman strongly disagreed with the award, that he was highly critical of the union for pursuing the grievance, that he was "fed up" with the union filing grievances and taking them to arbitration, that he wanted nothing to do with a union that would pursue grievances like the Curtis grievance, that he saw contracting out as a means of ridding the City of this problem and that this is why he was considering it. In other words, it appears that at least one motive for the decision with respect to initiating the contracting out process was to deter the union and employees from filing or pursuing these kinds of grievances on pain of losing their ability to handle this work, at least at the Ingram yard and in the areas specified in the notice. Indeed, as noted above, Mr. Wolfe acknowledged that the notice would cause concern to employees and the union, but that they could demonstrate that they were willing to co-operate with controlling drugs in the workplace during the subsequent process. In the context of these events, the conclusion that the notice was intended to alarm employees and exert pressure on them not to pursue grievances like that of Mr. Curtis is inescapable. Moreover, the singling out of the Ingram yard where Mr. Curtis works, the unusual stage at which the November 14th notice was issued and its proximity to the award all convey this message in an especially pointed fashion. Since filing and arbitrating grievances are protected activities under the Labour Relations Act, I find that the City's decision violated sections 65 and 67 of the Act. My conclusion in this regard means it is unnecessary for me to address the union's argument with respect to drawing an adverse inference from the Mayor's failure to testify in these proceedings.
- 52. However, the City argued that it has not yet either decided to or contracted out any work. All that it has done to date is to initiate a process for considering the matter, and counsel asserted that this more tentative activity could not form the basis of a violation. It is true that the City's actions at this point fell short of contracting out, and in this sense, its conduct is less egregious. Nonetheless, the City's own evidence demonstrates that it has triggered a process which may well lead to contracting out, and that such a process would not have been initiated at this time but for the union's decision to proceed to arbitration and the results of the arbitration award. It is worth noting as well that the notice given to the union states that "the Public Works Department

intends to recommend to Council the contracting out of the following services". This is less tentative than the way the City now seeks to characterize its actions. In any event, the fact that contracting out has not yet occurred does not necessarily mitigate the City's motivation for its conduct. Rather, the inchoate nature of its decision is a practical issue which is relevant to consideration of the appropriate remedy in these circumstances.

- 53. Mr. Wolfe conceded that at least some restrictions were placed on hiring and purchasing as a result of the contracting out decision. In this sense, the City's motive for the decision is relevant to the hiring and purchasing reductions, and to the extent that motivation is unlawful, such restrictions violate the Act as well.
- Apart from providing evidence of the City's motivation, the union also alleged that the Mayor's statements constituted independent violations of the Act in the sense that they were designed to intimidate the union and employees in regard to grievances, to disparage the union, and to alienate employees from the union. It is indeed difficult to read these statements as anything other than an attempt to convey to employees that taking particular kinds of grievances to arbitration will have undesirable consequences and to exert pressure on them to prevent them from engaging in this kind of activity. In addition, employees would be left with the impression that their union had endangered their source of work, and that union leaders were standing in the way of pay increases for employees. This conclusion is reinforced by the fact that the Mayor made statements in this regard over a three-week period to an assortment of media outlets.
- 55. Counsel for the City argued that the provisions of the collective agreement which protect the employment of individuals whose work is contracted out would take any sting or threat out of such statements. It seems reasonable to think that if employees were knowledgeable about such provisions, they would indeed have some ameliorating effect. Mr. Wolfe's statement in one of the newspaper articles that he doubted privatizing would lead to layoffs would also be helpful in this regard. At the same time, the clauses in question appear to be limited to permanent employees, and the enforcement of collective agreement provisions is ultimately in the hands of arbitrators and not amenable to guaranteed outcomes. Even a small degree of risk may loom large in the area of job security where the stakes are high for employees. Moreover, such provisions would only protect employees for the life of the collective agreement and must be read in a context where the Mayor also publicly declared that Council was not adverse to iron-fisted bargaining and would not back away from confrontation with the union. In addition, even contracting out which leads to a reduction of employees by attrition will ultimately shrink the bargaining unit and have an impact on the union's bargaining power, finances, and perhaps its eventual viability in the workplace, with a corresponding effect on the strength and rights of employees.
- Another argument advanced by the City with respect to these statements was that the Mayor could not be taken as speaking for the City because he was only one of a number of Councillors in a "weak mayor" system, that is, where he has only one vote out of fifteen on City Council. However, the City conceded that section 69 of the Municipal Act stipulates that the Mayor is the head of the Council and the chief executive officer of the corporation. It was also not disputed that section 70 of that Act sets out the Mayor's duties as including overseeing the conduct of all subordinate officers and that this included the human resources department, the public works commissioner and the city clerk. Neither is there any suggestion in the Mayor's statements that he is not speaking in his capacity as Mayor, and the statements themselves convey considerable confidence with respect to his ability to make the changes he desires. In these circumstances, the proposition that he was not speaking for the City is a dubious one.
- 57. Counsel was also of the view that the statements of politicians should be given wider lat-

itude by the Board because of the unique features of political life, and that the Mayor's statements were simply a colourful and flamboyant way that a politician indicated that he did not like an award and that he intended to take it to judicial review. He conceded, however, that politicians should not be subject to a different or lesser test in considering whether the *Labour Relations Act* had been breached.

- Nonetheless, it is difficult to view this argument as anything but advancing that very proposition. The idea that politicians might be able to make statements of this nature with greater immunity than ordinary citizens is not particularly compelling. Indeed, one would think that elected officials might take particular care to ensure that their public statements in office were consistent with the law. In any event, there is no reason for the Board to apply a lesser standard of conduct to those responsible to the electorate than to the electorate itself and no jurisprudence to support such a proposition. To the extent that context is important in considering all statements alleged to be violations of the Act, I have taken that into account here as well. And while the Mayor does refer to judicial review in his statements, he says a great deal more than that.
- 59. Looking at the statements as a whole, there can be little doubt that the message that would be conveyed to employees and the union was that filing and pursuing particular kinds of grievances would result in the loss of certain work to contracting out with an attendant degree of uncertainty in terms of job security and the weakening of the union's base, and that the union has already endangered that work by proceeding with the Curtis grievance. As a result, the statements amount to violations of sections 67(c) and 65 of the *Labour Relations Act*.
- Turning next to the matter of Mr. McDonald's removal from the Joint Health and Safety Committee, I find that despite Mr. McDonald's testimony, the evidence indicates that he did not sit on this committee on a regular basis. Among other things, it is consistent with Mr. McDonald's status as an alternate that for the most part Mr. Tucci attended the meetings of this Committee. However, it is also clear that the two of them did occasionally attend together, and that it was Mr. McDonald's opposition to discussing the award at the special meeting which prompted the City's decision that only one of them could attend in the future. Although the City argues in its defence that it did not specify which one, the fact that Mr. Tucci was the regular member and Mr. McDonald the alternate made it a foregone conclusion that it was Mr. McDonald who would be barred from participating as a result of the City's decision.
- 61. There was no suggestion that participating in a joint health and safety committee was not a lawful activity of a union, and I find that the City's conduct in this regard also amounted to an attempt to interfere with the administration of the union contrary to section 65.
- 62. The statements alleged to have been made by Mr. McClusky are a different matter. The union's evidence on this did not stand up well to cross-examination, and I am not convinced, even in the presence of the reverse onus, that these statements were made. As a result, that part of the union's application is dismissed.
- 63. This brings me to the question of remedy. Section 91 provides the Board with a broad and comprehensive jurisdiction to award remedies:
 - 91.-(1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.
 - (2) The labour relations officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.

- (3) The labour relations officer shall report the results of his or her inquiry and endeavours to the Board.
- (4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,
 - (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
 - (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;
 - (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or
 - (d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.
- (4.1) For the purpose of remedying a contravention of section 41.1, the Board shall not settle any provision of an adjustment plan on terms determined by the Board.
- (5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.
- (6) A trade union, council of trade unions, employer, employers' organization or person affected by the determination may file the determination, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.
- (7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).
- 64. The Board has observed on a number of occasions that rights are only meaningful where they are supported by effective, creative remedies attuned to the economics and psychology of the situation before the Board. In this regard, the Board commented in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 as follows:

- 93. It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the cooperation of employers and trade unions in the day-to-day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, A Touchstone for Labor Board Remedies (1968), 14 Wayne L. Rev 1039; Ross, Analysis of Administrative Process Under Taft-Hartley, [1966] Lab. Rel. Yearbook 299. Giving effect to these general considerations, three basic principles that underpin section 79 have emerged.
- 65. Several basic principles can be elucidated within this general framework which the Board went on to discuss in *Radio Shack*, *supra*. The most relevant here is the proposition that the primary purpose of a remedy should not be to penalize or punish a party, but rather to make the injured party "whole", that is, to repair the damage inflicted by the violation as completely and comprehensively as is possible.
- 66. The mere novelty of a remedy will not take it beyond the Board's comprehensive remedial jurisdiction. As the Divisional Court observed in dismissing an application to review *Radio Shack*, *supra*:

So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.

In the same decision, the Court also commented on the Board's expertise more generally:

The Legislature of the Province of Ontario has entrusted to the Labour Relations Board an onerous and demanding responsibility. It is required to monitor and supervise a great many aspects of industrial relations and to minimize industrial disputes. The Board has in the past, does today, and will tomorrow concern itself constantly with employers, unions and employees. It is a continuous and unending process. In the course of its work the Board acquires a vast experience and expert knowledge in the field of industrial relations.

67. In assessing what is necessary to make the complainant "whole", the Board's long-standing approach is to apply an objective test. Rather than looking for evidence of each employ-ee's subjective reaction to the unfair labour practices, the Board considers the impact of the violations on the ordinary employee, neither the most timid nor the most stalwart. There are several reasons for this approach. Among other things, the views of employees subsequent to intimidating activities by an employer may be unreliable as a guide to the impact of such conduct, since it may have already accomplished its purpose. Secondly, such an inquiry is likely to lead the Board into

territory involving the views of employees about union representation, particularly in a situation such as this where the union argues that part of the purpose of the City's activities was to disparage the union's leadership. This is an area in which the Board strives to avoid unnecessary disclosure pursuant to section 113 of the *Labour Relations Act*.

- 68. In this case, the union has requested a declaration that the City has violated the Act, a cease and desist order, an order reinstating Mr. Curtis, letters to employees setting out certain rights and obligations, the retraction of the November 14 contracting out notice, compensation for damages, the reinstatement of Mr. McDonald to the Joint Health and Safety Committee, an order restraining the City from either recommending to Council that the services in the November 14 notice be contracted out or from contracting out, an order restraining the City from imposing a hiring and purchasing freeze and an order to lift any freeze already imposed.
- 69. Counsel for the City indicated that if the Board found violations of the Act, the City did not take issue with the appropriateness of a declaration, a cease and desist order or notices to employees, and I find that these remedies are appropriate in the circumstances. On the other hand, the union conceded that it did not have quantifiable damages at this point in time, aside from the costs of the implementation hearing before the arbitrator. However, since I have deferred to the arbitrator with respect to that matter, there is no basis on which to award those costs. Similarly, the request for an order reinstating Mr. Curtis involves the same deferred issue, and has in any event been eclipsed by events and rendered moot.
- The reinstatement of Mr. McDonald to the Joint Health and Safety Committee involves other considerations. Because Mr. McDonald did not attend many of these meetings, an order which would directly or indirectly have this effect provides more than is necessary to repair the damage caused by the unlawful restrictions on his participation. The evidence indicates that it was primarily Mr. Tucci who attended the Committee meetings, but that Mr. McDonald occasionally attended as well, either replacing or in addition to Mr. Tucci. As a result, the appropriate remedy is that Mr. McDonald continue in his status as the alternative representative, that he be permitted to attend meetings in Mr. Tucci's absence, and that he be allowed to attend some meetings with Mr. Tucci as well. The intervals at which he may attend with Mr. Tucci are to be worked out by the parties, but should reflect his pattern of attendance prior to the City's refusal to allow Mr. McDonald to participate.
- 71. The orders requested with respect to the contracting out process are more novel. Initially, the union asked for a direction preventing the City from proceeding with the contracting out process initiated in November and prohibiting it indefinitely from contracting out in the future, although it subsequently modified its position. Since at least part of the motivation for triggering the contracting out process was unlawful, it is clear that the City cannot be allowed to continue with the process initiated in November. Among other things, if the City is permitted to take the process through to its conclusion and work is contracted out as a result, employees are likely to perceive that it has been successful in carrying out its threats with a corresponding impact on their ability to exercise statutory rights without fear of reprisal. In other words, the City will have accomplished the very result that it sought to achieve by its unlawful conduct. Similar considerations obtain with respect to the restrictions on hiring and purchasing.
- 72. I have considered the fact that the present process may not lead to contracting out, and whether it might be more appropriate to await the result of the process before fashioning a remedy. However, the effect of a twenty-four week period of uncertainty in this regard on employees will also undermine the ability of employees to freely exercise their rights under the Act, given the events which have preceded it. Moreover, if the Board permits this process to continue, it will lend

a legitimacy to it and to its ultimate result which is at odds with the fact that it was motivated in part by unlawful considerations. Accordingly, the contracting out process started in November must be halted. However, many of the same considerations apply if a new process is commenced within a short period of time. The message to employees will still be that filing or pursuing particular kinds of grievances has resulted in the loss of certain types of work, the shrinking of the bargaining unit and consequently their bargaining agent's sphere of influence. To repair the damage caused by the City's statements and conduct, it is necessary to provide a period of stability to rekindle the confidence of employees in their union and in their right to engage in its lawful activities without fear of reprisal. Any contracting out permitted under the collective agreement must take place at a point sufficiently removed in time so that employees will not trace its origins to either the Curtis award or the other grievances referred to by the Mayor. Since the City's evidence indicated that there were no immediate plans to contract out services other than as a result of the Curtis award, some temporary moratorium on contracting out will not work a serious hardship upon it. And to the extent that this remedy is somewhat novel, it flows directly from the specific nature of the violations in this case, and is tailored as closely as possible to rectifying them.

- On the other hand, an indefinite prohibition against contracting out is not congruent with the fact that these matters are normally the subject of bargaining, and the collective agreement between the parties does not contain such a ban. Such a prohibition would have the effect of handing the union a windfall, which is not consistent with the purposes of the Board's remedies. Moreover, the provision of the kind of notices requested by the union will help to ameliorate the damage done to the union's credibility and the fears that employees may now have with respect to the exercise of their statutory rights. In coming to this conclusion, I have also considered the fact that this is not a new labour relationship, and although it is unfortunately one which must be characterized as long-standing, rather than mature, it is not as fragile as one in its infancy. Among other things, this means that there is a collective agreement in place with provisions protecting employees to some extent from job loss in the event of contracting out. Moreover, the fact that the union could and did respond publicly to the Mayor's statements is an element to be considered in measuring the damage flowing from the City's violations as well. It is also worth noting that some grievances have in fact been filed by employees since November, although the conclusions to be drawn from this evidence are somewhat limited in light of its ambiguous and subjective nature. However, it does appear that the problems likely to flow from the City's activities are not so severe as to warrant such a sweeping remedy.
- 74. The union's modified position was that contracting out should be prohibited during the life of the current collective agreement. There is no doubt that this is a useful remedial option to consider in cases where it is necessary to provide an opportunity for the parties to bargain about an issue. In this case, however, the facts indicate that the Board's primary task is to design a remedy that provides employees with the necessary stability and security to rectify the effects of the City's conduct.
- 75. Balancing these interests, I conclude that an order prohibiting the City from contracting out services performed by members of the union's bargaining unit for a period of six months will supply a badly needed period of stability without creating undue hardship for the City in practical terms. Prohibiting a hiring and purchasing freeze for the same period of time is appropriate for similar reasons. In determining the length of this period, I have taken into account that a number of months have already elapsed since these events.
- 76. The City argued that the Board could not fetter the activities of a democratically elected body such as City Council, and that any restriction on contracting out was thus precluded. While such an argument has some superficial appeal, it does not stand up to further analysis. There is no

question that City Council is bound by the *Labour Relations Act*, and the fact that it is an elected body does not permit it to pass motions or take action in violation of that Act. Similarly, where one arm of the responding party, that is, the Mayor or the Public Works Commissioner has engaged in unlawful conduct necessitating a remedy, it is difficult to see why another arm of the responding party should not be subject to that remedy where it is necessary to make the complainant whole again. Among other things, I note that the parties have agreed that the proper responding party in this matter is the Corporation of the City of North York, rather than the Mayor or the Commissioner of Public Works.

- 77. Turning finally to the notices requested, the union proffered no reason why they should take the form of letter to employees, rather than the more usual method of posting in the workplace, and I find the latter to be a sufficient means of bringing the relevant rights and obligations to the attention of employees in this case.
- 78. In summary, then, I conclude that the City has violated sections 65 and 67 of the *Labour Relations Act*, and direct as follows:
 - (a) That the City cease and desist from violating the Labour Relations Act.
 - (b) That Mr. McDonald be permitted to attend meetings of the Joint Health and Safety Committee in the same pattern as he did prior to November 17, 1994.
 - (c) That notices in the form of Appendix A be posted in conspicuous locations in the workplace where they are likely to come to the attention of employees for a period of thirty (30) days.
 - (d) That the City cease and desist from proceeding further with the contracting out process initiated in November of 1994.
 - (e) That the City remove the restrictions on hiring and purchasing imposed in November of 1994.
 - (f) That the City be prohibited from initiating consideration of or contracting out services performed by members of the bargaining unit for a period of six (6) months from the date of this decision.
 - (g) That the City be prohibited from imposing restrictions on hiring and purchasing with respect to services performed by members of the bargaining unit for a period of six (6) months from the date of this decision.
- 79. The Board remains seized with respect to the implementation of this decision.

Appendix '^

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

AFTER A HEARING IN WHICH BOTH THE CITY OF NORTH YORK AND THE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 94 HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND MAKE ARGUMENTS, THE ONTARIO LABOUR RELATIONS BOARD HAS FOUND THAT THE CITY VIOLATED THE LABOUR RELATIONS ACT.

AS A RESULT, THE BOARD HAS ORDERED THE CITY TO STOP THE CONTRACTING OUT PROCESS AND THE RESTRICTIONS ON HIRING AND PURCHASING STARTED IN NOVEMBER OF 1994. IN ADDITION, THE BOARD HAS ORDERED THE CITY NOT TO INITIATE CONTRACTING OUT OR IMPOSE RESTRICTIONS ON HIRING AND PURCHASING FOR A PERIOD OF SIX MONTHS, AND TO POST THIS NOTICE ASSURING EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES EMPLOYEES THE RIGHT TO BE REPRESENTED BY A UNION, TO ENGAGE IN ITS LAWFUL ACTIVITIES AND TO FILE GRIEVANCES.

THE ACT GIVES UNIONS THE RIGHT TO TAKE GRIEVANCES TO ARBITRATION ON BEHALF OF EMPLOYEES AND TO ENFORCE THE AWARDS THAT RESULT.

IT I'S ILLEGAL FOR AN EMPLOYER TO INTERFERE WITH THESE RIGHTS, TO INTIMIDATE EMPLOYEES SO AS TO DETER THEM FROM EXERCISING THESE RIGHTS OR TO RETALIATE AGAINST THEM OR THEIR UNION FOR EXERCISING THESE RIGHTS.

THE CORPORATION OF THE CITY OF NORTH YORK

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

THIS NOTICE MUST REMAIN POSTED FOR 30 CONSECUTIVE WORKING DAYS.

DATED THIS 19TH DAY OF SEPTEMBER. 1995.

4124-93-U Yvonne Couperus, Applicant v. United Textile Workers of America (Local 478), Responding Party v. C.S. Brooks Corporation, Intervenor

Discharge - Duty of Fair Representation - Unfair Labour Practice - Union's determination not to refer applicant's discharge grievance to arbitration tainted by inappropriate considerations - Union's conduct both arbitrary and taken in bad faith - Application allowed

BEFORE: Lee Shouldice, Vice-Chair.

APPEARANCES: D. Bruce Sevigny, B. Massey and Y. Couperus for the applicant; Vernon Mustard, S. Condie and P. English for the responding party; V. Johnston and W. Jones for the intervenor.

DECISION OF THE BOARD; September 27, 1995

I. Introduction

- 1. By way of decision dated July 7, 1995, I determined that the responding party, "United Textile Workers of America (Local 428)" (hereinafter "the union"), had violated section 69 of the Labour Relations Act (hereinafter "the Act") when it determined that it would not refer the applicant's discharge grievance to arbitration. I now provide the parties with my detailed reasons for reaching that conclusion.
- 2. The hearing of this matter consumed seven hearing days. I heard testimony from five witnesses. Although many of the facts relating to this application are not in dispute (due, largely, to the documentation of almost every communication between the parties), it has been necessary for me to make certain determinations of fact in order to arrive at my decision. In the course of making those determinations, I have been required to assess the relative credibility of the witnesses who testified. When making those assessments, I have considered such factors as the consistency of the evidence given by the witness, the ability of the witness to avoid the tug of self-interest, and whether the testimony of the witness would seem to be in accord with what would appear to be reasonable in all of the circumstances.

II. The Facts

- 3. The applicant was at all material times employed by C. S. Brooks Corporation (hereinafter "the employer") in its manufacturing plant in Iroquois, Ontario. The employer is a manufacturer and distributor of bath products, including towels. The non-managerial plant employees, of which Mrs. Couperus was one, are represented by the union. Mrs. Couperus was first employed with the employer in January, 1987 as a machine operator, performing sewing repairs. In October, 1987, she successfully bid for the position of Barudan Operator/Classer, the position she held at the time of her termination of employment.
- 4. There was a great deal of evidence before the Board respecting the substance of the Barudan Operator/Classer position at the employer's operations. In essence, the role of a Barudan Operator/Classer is to wheel a "truck" loaded with material to the Barudan machine, to feed the material into the machine where it is hemmed, and to pick up and class the finished product once it alights from the machine. The finished product is placed on a "truck" for transfer.
- 5. The core event which, ultimately, led to all of the events which are before the Board occurred in May, 1990. On or about May 23 or 24, 1990, the applicant experienced lower back pain

while operating the Barudan machine. On May 25, 1990, Mrs. Couperus was in such pain that she spoke to her union steward, Deborah Workman, who advised her to punch out and go home. Mrs. Couperus testified that she was also advised at that time by Ms. Workman to put in a claim with the employer for sick leave. In fact, she did leave the employer's premises that day and she did, subsequently, file a sick leave claim with her employer's disability carrier. The applicant was off work until November, 1990 at which time she filed a claim with the Workers' Compensation Board (hereinafter "the W.C.B."). There was some questioning of the applicant respecting the *bona fides* of her sick leave claim. For the purposes of this decision it is unnecessary to comment on that evidence.

- 6. Mrs. Couperus ultimately returned to her Barudan Operator/Classer position on or about December 12, 1990. At that time, the applicant's doctor, Dr. Appleby, indicated in writing that Mrs. Couperus should not lift more than 10 kg. at one time. The applicant testified that, upon her return to work for the employer, she encountered some difficulties, in particular the pushing and pulling of trucks of cloth. She worked, off and on due to her medical difficulties, until May, 1991, at which time she once again left work permanently due to her back pain. I should note here that Mrs. Couperus stated that throughout this time the only responses she received to her requests for help from Ms. Workman or from Mr. Jones, the employer's Personnel Manager, were "snickers" and "jokes". Mr. Jones, in his testimony, denied snickering or joking about Mrs. Couperus' condition. Again, although it is unnecessary to delve into these collateral allegations to any great degree, in my view the evidence before me does not establish that such comments were made to Mrs. Couperus although that is not to say that Mrs. Couperus may well believe that Mr. Jones did snicker and joke about her condition. It is evident from the applicant's testimony that she extremely dislikes Mr. Jones and, to this day, holds a grudge against both him and the employer.
- Throughout this time W.C.B. officials were involved with the parties, and a number of "work hardening" programs were undertaken in an attempt to get Mrs. Couperus back to work in such a manner as to not aggravate her back injuries. At the same time she was attending at her physician's for medical treatment, and consulted with specialists respecting her back difficulties. In September, 1991, the W.C.B. determined that Mrs. Couperus had reached her maximum medical recovery from her back injury. Permanent restrictions on her work activities were identified at that time. A further attempt to return Mrs. Couperus to work in November, 1991 failed after only a few days due to back pain. Later, in June, 1992, the employer, with the assistance of a W.C.B. vocational rehabilitation caseworker, attempted to return the applicant to work. Her return to the plant was sporadic over a three or four week period, because of reoccurring back pain. In early July, 1992, the applicant left work, unable to perform the Barudan Operator/Classer position.
- 8. On July 15, 1992, Mr. Jones wrote to Mrs. Couperus, indicating that the employer would be proceeding with the termination of her employment, effective July 22, 1992, on the basis of her most recent medical note which stated that she was not to return to the type of production work previously performed by her, and in light of the unsuitability of the modified work previously provided by the employer. There was a great deal of contradictory testimony respecting what events subsequently transpired. Mrs. Couperus states that she contacted the Local Union President, Mrs. Elaine Sipes, who indicated that Mr. Jules Lemay, the union's Business Representative, would call her. At the same time, Mrs. Couperus called Mr. Jones, who, she testified, made it "clear that he was upholding" the decision. Mr. Jones states that he spoke to Mrs. Couperus and told her that, in light of her dispute over the issue, "we will carry on". Mr. Lemay testified that although he was unclear of the date of the discussions he had with Mr. Jones and Mrs. Couperus, he spoke first to Mrs. Couperus to identify the issue, then to Mr. Jones who confirmed that there would be no termination, and then again to Mrs. Couperus to communicate what Mr. Jones had told him.

- 9. On balance, I am satisfied that there was an attempt to communicate to Mrs. Couperus that her employment with the employer would not be terminated as indicted in the letter of July 15, 1992. Mr. Jones' comment to Mrs. Couperus was, unfortunately, somewhat vague and was not followed up in writing to her. Mr. Jones testified that Mrs. Couperus was upset when he spoke to her, and was "attacking" him on the phone. As a result, I do not doubt that Mrs. Couperus did not grasp the essence of what Mr. Jones meant to communicate. Mr. Lemay's subsequent conversation with Mrs. Couperus also did not bring it home to her that her employment relationship with the employer would not be ending immediately. However, I am satisfied that Mr. Lemay made an attempt to do so during that conversation. Both Mrs. Couperus and Mr. Lemay testified that Mrs. Couperus told Mr. Lemay during this conversation that she wanted him to file a grievance over this matter, and that Mr. Lemay's response was to state to her that "you have no grievance". That response is consistent only with the scenario put forth by the union and the employer that it had been decided by the employer, and communicated to Mr. Lemay, that Mrs. Couperus was not going to lose her employment at all.
- 10. This was the first of many miscommunications which occurred amongst these parties. The result of this initial miscommunication was that Mrs. Couperus was left with the impression that her employment with the employer had been terminated in July, 1992. There was some evidence led to suggest that this impression of the applicant was unreasonable, in particular evidence that the employer continued to openly contribute to her benefits beyond July, 1992. However, Mrs. Couperus denied receiving two letters put to her in cross-examination respecting the continuation of her benefits and I am satisfied, on balance, that Mrs. Couperus legitimately held the belief that her employment with the employer had ended in July, 1992. This impression lasted into November, 1992 when Mrs. Couperus, referring to their earlier discussion in August, 1992, wrote to Ms. Sipes to ask for a copy of the collective agreement. Ms. Sipes thereupon contacted Mrs. Couperus and advised her that she understood that the employer would be formally rescinding the termination letter. This discussion led to a flurry of correspondence by Mrs. Couperus. Approximately two weeks later, at a W.C.B. hearing convened to deal with the continuation of her benefits (they had been discontinued the previous June), Mr. Jones confirmed to Mrs. Couperus that Ms. Sipes' earlier advise was accurate.
- 11. It is evident from the evidence that the events of July, 1992 to December, 1992 created in Mrs. Couperus a great deal of distrust towards the union and the employer. On January 7, 1993, a meeting was convened of Mrs. Couperus, Ms. Sipes, Mr. Lemay and Mr. Jones, to discuss a number of matters relating to the continuing employment of Mrs. Couperus, including compensation for the six month period during which she believed that she had been terminated. Mrs. Couperus attended at the meeting with a tape recorder and was permitted to record what was said at that time. Mrs. Couperus testified that she felt she had no choice but to record the meeting in light of her experience with the union and because she felt that previously she had been bullied and attacked by Mr. Lemay. She also insisted that a friend of hers, one Jane Scharf, be entitled to sit in at the meeting. This was not objected to by anyone except Mr. Lemay, who questioned the need for her attendance. Eventually, however, Mr. Lemay did not continue to object to Ms. Scharf's presence as an observer. The meeting lasted approximately one hour and a further meeting was scheduled for January 20, 1995.
- 12. The meeting of January 20, 1995 did not unfold as had been expected. Mrs. Couperus once again desired to tape record the proceedings. Mr. Walter Bailey, the Plant Manager, refused to permit the recording of the meeting and, shortly after it commenced, adjourned the meeting. At the outset of this meeting Mrs. Couperus attempted to confirm what she believed to be the parties' earlier resolution of her dispute respecting compensation for wages lost by her between July and December, 1992. Mrs. Couperus was of the view that Mr. Jones had stated at the prior meeting

that, should the Workers' Compensation Board not fully compensate her for the wages and benefits she lost during the six month period, the employer would. Words alleged to have been spoken by Mr. Jones at the meeting of January 7, 1993 were interpreted by Mrs. Couperus as a guarantee that she would be fully compensated by the employer. The employer did not agree with Mrs. Couperus' interpretation of Mr. Jones' words. In any event, the meeting of January 20, 1993 did not proceed to any great extent, and a further meeting was scheduled. Mrs. Couperus confirmed her attendance but insisted on being accompanied by her tape recorder. This was not acceptable to others planning to be in attendance. Accordingly, the meeting (and a number of others) between the union and the employer went ahead, but in the absence of Mrs. Couperus.

- After a great deal of negotiations it was agreed between the employer and the union that the employer would compensate Mrs. Couperus for one-half of her out-of-pocket losses for the six-month period in question. The proposal initially made by the employer was to compensate the applicant for one-third of her losses; however, after considerable negotiation the union convinced the employer to shoulder one-half of the losses. When this settlement agreement was put to Mrs. Couperus she rejected it outright. The applicant quite bluntly indicated that, in her view, the employer was entirely at fault for the predicament that she had found herself in, and that the employer should bear the burden of paying nothing less than 100 per cent of her out-of-pocket losses. Mrs. Couperus asked the union to grieve her losses and to proceed to arbitration; the union determined that it would not do so, and advised her in writing that in lieu of accepting the settlement reached by the employer and the union, her remedies would lie elsewhere, particularly at the Workers' Compensation Board and/or the Human Rights Commission.
- I note here that, initially, Mrs. Couperus included as part of her claim in this proceeding a request that I determine that the union's decision not to grieve and proceed to arbitration respecting her out-of-pocket losses for the six-month termination period was a breach of section 69 of the Act. However, during the course of the hearing the parties resolved that issue. Accordingly, the above events are recorded for the sole purpose of describing the evolution of the relationships amongst the parties. It is evident that, by March, 1993, Mrs. Couperus had very little trust in, or respect for, the union and its representatives.
- At the meeting of January 7, 1993, it was agreed by the employer that Mrs. Couperus would recommence her work at the plant on January 11, 1993. However, the return of Mrs. Couperus to the workplace was not as a Barudan Operator/Classer. Instead, Mrs. Couperus agreed, as part of a work trial, to work in the office performing work relating to bar coding of product, and some daily inventory tasks. The same medical restrictions as had previously been applied to Mrs. Couperus were applied at this time. Due to certain lay-offs that affected the plant during the early spring of 1993, the work trial was not completed until May, 1993. At that time, the employer offered to Mrs. Couperus the opportunity to work on the Barudan machine as an Operator/Classer. Although Mrs. Couperus preferred to continue performing the bar coding tasks, ultimately she agreed to return to the Barudan machine, for the purpose of completing a further work trial, with the expectation that all of her medical restrictions would be recognized and accommodated by the employer. This brings the parties to the start of July, 1993.
- As noted above, throughout the course of these events the Workers' Compensation Board, particularly the Vocational Rehabilitation Services Division of the Board, was actively involved with the parties in order to effect a successful return to the workplace by Mrs. Couperus. As part of those efforts, in July, 1993, a report was authored by Mr. Philip Allan, an Ergonomics Specialist who works out of the Ottawa Regional Office of the Workers' Compensation Board. The report is eight pages in length and is unnecessary to describe in detail for the purposes of this decision. In essence, Mr. Allan concludes that the Barudan Operator/Classer job is not a suitable

position for Mrs. Couperus, having regard to the then-existing medical restrictions. However, with certain modifications, Mr. Allan concludes that the Barudan Operator/Classer job can be performed by Mrs. Couperus. Mr. Allan identifies, at the end of the report, three required accommodations, and seven additional safety recommendations. The omission of one of the required accommodations would make the position unsuitable for Mrs. Couperus; the additional recommendations are presented to further ensure the worker's health and comfort.

- 17. Ultimately, this report became a significant touchstone for both Mrs. Couperus and the employer. Mrs. Couperus testified that she disagreed with the report, on the grounds that all of the accommodations contained therein were insufficient to accommodate her in the Barudan Operator/Classer position. That being said, there would not seem to have been delivered to the employer any independent medical evidence to suggest that other accommodations were required of the employer. In that regard, the employer effected both the required accommodations and the additional safety recommendations as suggested by the W.C.B. report, and assumed that those steps were sufficient to ensure Mrs. Couperus' return to work on a permanent basis.
- 18. This was not, in fact, to be. Mrs. Couperus experienced back pain as a result of working in the Barudan Operator/Classer position, and the work trial was extended through to October, 1993 in order that Mrs. Couperus would have a full opportunity to work in the accommodated position. In late September, Mrs. Couperus was offered the Barudan Operator/Classer position on a permanent basis, within the medical restrictions and with the accommodations then in place. In early October, 1993, Mrs. Couperus accepted the position, although it is evident that she disputed (as she had from the outset) that the employer had fully and properly accommodated her disability.
- 19. On October 27, 1993, the applicant once again left the workplace, complaining of a reoccurrence of her back injuries. Mrs. Couperus contacted Mr. Jones on November 16, 1993 and indicated that she desired to return to work, with modified duties, until she was capable of returning to her regular modified position. Mr. Jones indicated that the Barudan Operator/Classer position was the only position available for Mrs. Couperus, and that he would only permit her to return to work if she were to provide a medical note to the effect that she was capable of performing that position within the existing medical restrictions and accommodations.
- This discussion led to the exchange of a number of pieces of correspondence between the applicant and the employer (copied to the President of the local union, Mr. Pat English). The upshot of Mrs. Couperus' correspondence was that she was capable of returning to light duties, and wished to return to work to perform such duties. What can only be described as a scrawled doctor's note was submitted as medical support for the applicant's desire to return to work (it appears to state that Mrs. Couperus could, as at that date, "return to work on light duties"). The essence of the employer's response was that her doctor's note was unhelpful, and that what Mrs. Couperus needed to do before returning to work was to obtain her doctor's opinion on whether the Barudan Operator/Classer position, as modified, is suitable employment for her and, if not, to have her doctor outline those aspects of the job which are and those aspects of the job which are not suitable. It does not appear that such a medical opinion was ever submitted to the employer.
- 21. Mrs. Couperus did not return to work in December, 1993. However, on January 14, 1994, Mrs. Couperus telephoned Mr. Jones at the plant and indicated that she intended to return to work. Mr. Jones reiterated his request for a medical report in the nature of that described above, as he was concerned with the possibility that Mrs. Couperus would return to the plant and reinjure herself. He indicated to Mrs. Couperus that the employer was not prepared to return her to work until the appropriate medical information was provided. By way of letter dated January

- 15, 1994 (but forwarded on January 17, 1994) Mrs. Couperus wrote to Mr. Jones, indicating that she would be reporting to work for her regular modified duties on Tuesday, January 18, 1994. A note from the applicant's doctor dated January 17, 1994 was also placed into evidence. Hastily written on a prescription page was the following statement: "Mrs. Couperus may return to full time modified work Jan. 18. 1994. (Modified means within previously described restrictions)".
- On January 18, 1994, Mrs. Couperus attended at the plant for her regular 3:00 p.m. shift. At approximately 2:45 p.m., Mr. Jones saw Mrs. Couperus in the cafeteria and requested that she attend with him in his office. She refused to do so until 3:00 p.m. and, at that time, in fact went out onto the plant floor to commence work at the Barudan machine. At that time her supervisor escorted her to Mr. Jones' office. Mr. Jones provided her with three letters which had been prepared over the previous three working days, but had not yet been delivered to her. Mrs. Couperus read the letters, disputed the need for more medical information, and went back out to the shop floor, despite Mr. Jones' instruction that she not do so. Shortly after, Mr. Jones and Mr. Bailey, the Plant Manager, went out to Mrs. Couperus' workstation and after some effort managed to convince her to return to the Personnel Office.
- At that point, a long discussion ensued involving Mrs. Couperus, Mr. Bailey, Mr. Jones and Mr. English, the President of the union. The applicant was told by Mr. Bailey to go home and to not return until the appropriate medical documentation was provided. Mrs. Couperus refused to leave. Eventually, the police were called (with the applicant's concurrence) and Mrs. Couperus was removed from the premises at approximately 5:00 p.m. It was the applicant's testimony that she wanted the police to attend at the plant in order to provide her with a document that would "validate" or confirm her presence at the plant that day. Quite frankly, I find it hard to comprehend how there could have been any question at all that Mrs. Couperus was at the plant that day, as her attendance and conduct could not possibly have been lost on the employees present who witnessed the events described above.
- The employer's response to these events was hardly surprising. By way of letter dated January 21, 1995, the employer terminated the employment of Mrs. Couperus. The letter was delivered to her on January 25, 1995, in the presence of the union's Vice-President, Mr. Gerry Baker. Two grounds are identified in the letter as justifying the decision to terminate the applicant's employment her repeated failure to provide satisfactory medical information respecting the limitations on her ability to return to work, and the "severe insubordination" of January 18, 1994.
- 25. By way of letter dated January 26, 1994, the applicant wrote to Mr. Jones and disputed the decision of the employer to terminate her employment. She enclosed her own grievance, alleging that her dismissal was without just cause. The grievance was copied to Mr. English and to Mr. Lemay. The union and employer treated Mrs. Couperus' grievance as having been filed by the union.
- The employer and the union agreed to a third-step meeting to discuss the grievance on February 4, 1994 at a local motel. The meeting was scheduled to commence at 1:30 p.m.; accordingly, the union arranged with Mrs. Couperus to meet at the motel at 10:00 a.m. that same day to prepare for the meeting with management. Mr. English, Mr. Baker and Mr. Lemay did, in fact, meet with Mrs. Couperus prior to the meeting with Mr. Bailey and Mr. Jones. Mr. English and Mr. Lemay had both reviewed their respective files respecting Mrs. Couperus' work history with the employer prior to the meeting. It was agreed that Mr. English would be the prime spokesperson for the union at the meeting with management in the afternoon. Mrs. Couperus testified that she was somewhat optimistic after meeting with the union in the morning that she would obtain some relief from the decision made by the employer approximately one week earlier.

- 27. The meeting with Mr. Jones and Mr. Bailey occurred later that day. Mr. Lemay and Mr. English both argued on behalf of Mrs. Couperus' interests at the meeting, insisting that any damage done to the relationship between the applicant and the employer could be repaired. The employer was insistent throughout the meeting that it would not permit the applicant's reinstatement on any grounds. Accordingly, the meeting could hardly be considered to have been successful from the perspective of the union. At that point, the union had not made any decision regarding what further steps, if any, would be taken to obtain Mrs. Couperus' reinstatement to her former position. The employer indicated that it would forward a formal response to the union.
- 28. By way of memorandum dated February 10, 1994, telefacsimilied to the union on that same date, Mr. Jones confirmed that the employer was not willing to reconsider its earlier decision to terminate the employment of the applicant.
- 29. Upon receipt of this memorandum, the senior officials of the union working out of its St. Catharines office (being Mr. Lemay and Mr. Condie, the Canadian Regional Director) and their consultant, Mr. Mustard, considered whether the applicant's grievance ought to be referred to arbitration. Mr. Lemay was the only one of these three individuals to testify, although all three were in attendance at the hearing. Mr. Lemay stated that the three of them "looked at all the evidence, took everything into consideration. We felt that the company had given all they could, and we did all we could. They had gone the extra mile to solve the problem. That's when we decided not to go to arbitration, and let the chips fall where they may".
- 30. This decision was confirmed to the applicant by way of letter dated February 11, 1994. Rather interestingly, the full-page letter, written by Mr. Condie, does not speak at all to the events of January 18, 1994, but rather deals only with Mr. Condie's concerns about the applicant's "continued failure and/or refusal to perform the modified work as required by the Company and as was agreed by the Ministry of Labour and Workers' Compensation Board as suitable and feasible with your level of disability". The letter goes on to note that the union "exhausted all reasonable efforts to bring about a fair and equitable resolution to this issue", and concludes by stating that "the union has no further recourse that it is prepared to consider at this time. Should you decide to carry this matter further, it will require some alternative initiative of your own choice". It was this decision by the union to not proceed to arbitration that resulted in the filing of this application.
- There was a great deal of testimony given by Mr. Lemay regarding his expectations prior to the third step grievance meeting, and the reasons behind the decision of the union to not proceed to arbitration with the applicant's grievance. At one point in his testimony, Mr. Lemay stated that prior to meeting with the employer he felt that the union could get the applicant back to work, particularly because of his good relationship with the employer. Mr. Lemay further remarked that after reviewing all of the information the union had prior to the third step meeting with the employer, he "thought he had a good enough case to win it". He stated that, during the meeting with the employer, even in the face of the employer's reticence to reinstate the applicant, he "kept working on it" and "never lost hope". When cross-examined by counsel for the applicant, Mr. Lemay confirmed that he felt his relationship with the employer could have meant success for the applicant during the meeting, but then somewhat surprisingly testified that he did not really think that success was possible and that the applicant was "cooked in the water".
- 32. This response led counsel for the applicant to ask Mr. Lemay a number of questions regarding why he felt that the applicant was "cooked in the water". Mr. Lemay stated in response that he felt that the applicant's case was not a good one because of her insubordination, her failure to support the work hardening program, and because "she was not supportive towards the union". In response to counsel's next question respecting the reasons for not proceeding to arbitration on

the applicant's grievance, Mr. Lemay stated "I myself handled most of the problems with her. I looked at everything else as they came. There was no support on the hardening program. She kept saying that it had not been met. She had disrespect for the Local itself and myself". Counsel for the applicant asked Mr. Lemay if that disrespect was the reason the applicant's case did not go ahead to arbitration. Mr. Lemay then stated "its not a reason to throw away a case". When immediately queried whether it was a reason in the applicant's case, he replied, that it wasn't.

- 33. Immediately after that testimony, Mr. Lemay was asked what he was specifically considering when he determined that the applicant was "cooked in the water". Mr. Lemay responded by saying "she wasn't interested, I guess. It appeared that no matter how hard I worked, she didn't want to go to work". Counsel stated, in response to that answer, "so she was being uncooperative, not being thankful", to which Mr. Lemay responded that although he liked to be thanked for his efforts, he considered that his job was a thankless one. Later during his cross-examination, Mr. Lemay once again explained his considerations in not moving the applicant's grievance to arbitration as including the applicant's "non-cooperative attitude; her failure to try the [work] hardening program; just not cooperating. She didn't work with her Committee". In re-examination, Mr. Lemay denied that the applicant's disrespect for him and the union had any role in the decision made by the union to not move the applicant's grievance to arbitration. He also denied, in re-examination, that he had felt tired during his cross-examination.
- Much of Mr. Lemay's testimony reflected the many frustrations that he had encountered in dealing with Mrs. Couperus. He quite candidly conceded that because of Mrs. Couperus' desire to tape record numerous discussions and meetings, he and the applicant "didn't hit it off too good", because the applicant "didn't sound like someone who wanted help". Mr. Lemay stated that sometimes he "exploded" or engaged in "shouting matches" with Mrs. Couperus because of the applicant's desire to utilize the tape recorder; in fact, he characterized the discussions he had with the applicant over the use of the tape recorder as being "hostile". He noted in his testimony that Mrs. Couperus never seemed to be satisfied with his representation of her, and wanted Mrs. Scharf to be in attendance at certain meetings. On numerous occasions Mr. Lemay noted that Mrs. Couperus neglected to thank him for his efforts on her behalf throughout the course of events in which he was involved. He also noted during his testimony that Mrs. Couperus, in his view, did not want to talk to the union and therefore there was limited communication between the union and the applicant.
- 35. It is on the basis of the above facts that this matter stands to be decided. It is appropriate, at this point, to set out the applicable legal principles.

III. The Law

- 36. The applicant has alleged a breach of section 69 of the Act, which reads as follows:
 - 69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Section 69 of the Act focuses on the conduct of the trade union. The Act prohibits a trade union from acting towards a bargaining unit employee in a manner that reflects arbitrariness, discrimination, or bad faith.

37. This statutory standard is imposed on trade unions because they are provided upon the issuance of a certificate (or, in certain cases, the execution of a voluntary recognition agreement) with the sole and exclusive right to represent all of the employees in the bargaining unit. A trade

union which is provided the exclusive right to bargain on behalf of a certain, defined group of employees may affect the working lives of those employees in many ways in its dealings with the employer. It is, accordingly, provided with considerable discretion when faced with making decisions affecting the working lives of bargaining unit employees. But that discretion is not unbounded. The Legislature has determined that, in exchange for exclusivity of bargaining rights respecting bargaining unit employees, a trade union is precluded from making decisions regarding the representation of those employees in an arbitrary or discriminatory manner, or in a manner that reflects bad faith. These are not particularly onerous restrictions on a trade union, and are reflective of the broad discretion which must necessarily be left in the hands of the trade union to make decisions which affect bargaining unit members, often with unequal effect.

38. A number of Board decisions have commented on the scope of the concepts of "arbitrary", discriminatory" and "bad faith" conduct. In *Savage Shoes Ltd.* [1983] OLRB Rep. December 2067, the Board noted as follows at para. 36:

Section [69] requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence in the process of results of union decision-making, on factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

Similarly, the Board in *Kenneth Edward Homer*, [1993] OLRB Rep. May 433 commented on the meaning of the three concepts in the following passage:

- 6. Honest mistakes, innocent misunderstandings, simple negligence, or errors in judgement will not, of themselves, constitute "arbitrary" conduct within the meaning of section 69. In other words, a trade union has a kind of "right to be wrong". Terms like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct found to be arbitrary within the meaning of section 69 (see, Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861, I.T.E. Industries, [1980] OLRB Rep. July 1001, North York General Hospital, [1982] OLRB Rep. Aug. 1190, Seagram Company Ltd., [1982] OLRB Rep. Oct. 1571, Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886, Smith & Stone, (1982) Inc., [1984] OLRB Rep. Nov. 1609, Howard J. Howes, [1987] OLRB Rep. Jan. 55, George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words are applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which could be considered to be arbitrary will depend on the circumstances.
- 7. The term "discriminatory" in section 69 has been interpreted broadly to include all cases in which a trade union distinguishes between or treats members differently without a cogent reason for doing so (see, for example, *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143, *Douglas Aircraft Co. of Canada Ltd.*, [1976] OLRB Rep. Dec. 779).
- 8. Actions or decisions motivated by hostility, ill-will or other improper considerations constitute "bad faith" within the meaning of section 69 (see, for example, Chrysler Canada Ltd., [1979] OLRB Rep. July 618, John Farrugia, [1978] OLRB Rep. Feb. 152, Leonard Murphy, [1977] OLRB Rep. March 146, Canadian Union of Public Employees Local 1000 Ontario Hydro Employees Union (sometimes cited as Walter Princessdomu), [1975] OLRB Rep. May 444).

- 39. It is, however, also evident that a clear line of demarcation cannot always be drawn between the concepts of "arbitrariness", discrimination" and "bad faith". In *Abdel Elejel*, [1985] OLRB Rep. June 841, the Board wrote that arbitrariness could be established if the trade union had acted on the basis of irrelevant factors or principles. Accordingly, the concepts of "arbitrariness" and "discrimination" may, in particular cases, appear similar in substance.
- 40. It is, by this time, somewhat trite to observe that no employee has an absolute right to have his or her grievance referred to arbitration by the trade union, unless such an obligation is specifically imposed on the trade union in the collective agreement in question. The reason for this limitation is obvious; the continuing relationship which exists between a bargaining agent and an employer requires good judgment to be exercised by a trade union regarding the litigation of grievances. In many cases, the exercise of good judgment will mean that a particular grievance ought not to be referred to arbitration. Quite simply, it makes little labour relations sense to refer grievances to arbitration which are of questionable merit. Accordingly, there is no absolute right to proceed to arbitration on any particular grievance filed by an employee.
- This does not, however, mean that the nature of the grievance under consideration by the union is of no importance. It is readily evident that the decision by a trade union to not pursue a grievance respecting (for example) entitlement to overtime pay will have far lesser significance to an individual grievor than would a discharge grievance. Discharge from employment has often been referred to as "industrial capital punishment". In recognition of the significance that discharge from employment has on the individual grievor, the Board has imposed on a trade union responding to a duty of fair representation complaint which relates to a discharge an obligation to explain, in satisfactory terms, why it did not pursue the employee's grievance to arbitration. As was noted by the Board in Swing Stage Ltd., [1983] OLRB Rep. Nov. 1920, at para. 47, "while the legal burden in a section [69] complaint is on the individual complainant, once it is established that a union member has suffered the ultimate sanction of discharge, this Board expects a persuasive account from the union to justify its refusal to file a grievance, or having done so, to carry the grievance to arbitration". Where it is possible that some remedy could have been obtained for the grievor at arbitration, the trade union which determines that his or her grievance should not be taken to arbitration will bear the onus of explaining the basis for that determination (see, as well, Kenneth Edward Homer, supra, at para. 10).
- 42. Finally, there was a great deal of evidence before the Board which, it was suggested, established that the applicant was unhelpful in her own cause, inasmuch as she took unreasonable positions throughout the events in question, and made it difficult for the union to represent her to the best of its ability. The evidence does, in the Board's view, reflect that Mrs. Couperus, on her own accord or at the instance of her "advisors", acted in a manner which made it substantially harder for the union to resolve at least some of her grievances with the employer. The approach by the Board to this type of situation is reflected in the decision of *Raymond McLeod* [1987] OLRB Rep. April 547, at paras. 43 and 44:
 - 43. The argument that Mr. McLeod himself could have done more on his own behalf in looking for witnesses is not without some merit. However, the union's duty of fair representation in these circumstances is not dependent upon the degree to which an employee can provide assistance in his own cause. The proscription against arbitrary conduct in section 69 is predicated on the fact that the union has been accorded exclusive rights to represent employees in their labour relations. The exclusivity of the union's mandate carries with it certain responsibilities with respect to the exercise of that representation which are appropriately attendant on a role of such significance. It follows that the core of the duty of fair representation obtains regardless of the efforts which may or may not be made by the employee himself. Indeed, in practical terms, it may well be that an employee who is least able to be effective on his own behalf may be most in need of the protection offered by section 69.

- 44. This does not mean that in evaluating the union's conduct, an employee's own behaviour will be ignored by the Board. To the extent that such behaviour forms part of the backdrop or context against which the union's actions will be assessed, it is one of many facts which the Board may consider in arriving at a decision in appropriate cases. While it does not relieve the union of its responsibilities under the duty of fair representation, it may help to shape the contours of that duty in particular cases.
- 43. With these legal principles in mind, I will now consider the facts of this case.

IV. Reasons for Decision

- In my view, it is evident from the testimony of Mr. Lemay that the union took into account inappropriate considerations when determining whether it would move Mrs. Couperus' discharge grievance to arbitration. I have no doubt, from the opportunity that I had to observe her, that the applicant can be an extremely difficult individual to deal with. Mrs. Couperus' desire to utilize a tape recorder to record verbatim every comment made by every individual involved in every meeting respecting her grievances was obviously a troublesome matter for Mr. Lemay, as it would be for anyone in his position (or, for that matter, in the position of the employer). Quite simply, the applicant's insistence on tape recording meetings was ill-advised, counter-productive, and unhelpful. Her repeated demands that her claims be "settled" on the basis of a 100 percent payment to her, on a "with prejudice" basis, can hardly be justified. It is unfortunate that Mrs. Couperus did not obtain capable advisors until the commencement of this proceeding, as I believe that if she had done so her employment situation may well have turned out quite differently, and her employment with the employer may not have been terminated at all.
- All that being said, though, unions in this province are faced, each and every day, with employees such as Mrs. Couperus, who propose or insist upon unsophisticated resolutions to the labour relations dilemmas that they find themselves in. And each and every day trade unions typically manage to find ways to accommodate those individuals' demands and concerns in a manner that ensures that its duty to fairly represent those individuals is discharged. A trade union's duty of fair representation to a bargaining unit employee is not in any way lessened because of a particular employee's level of sophistication, education, or a tendency to utilize poor judgment in his or her interactions with his or her employer, the trade union, or both. Nor is that duty lessened because one or more officials of the trade union perceives, rightly or wrongly, that the employee does not trust or respect him, her, or the bargaining agent. The trade union must deal with these "difficult" employees in the same way they deal with all other employees in a manner which is devoid of bad faith, and is neither arbitrary nor discriminatory.
- 46. On the facts of this case, save and except for the evidence relating to the rationale for the union's decision not to take Mrs. Couperus' grievance to arbitration, I heard little evidence suggesting that the union had breached its obligations under section 69 of the Act, as they related to the applicant. The relationship between the applicant and Mr. Lemay, on behalf of the union, was, since "day one", an uneasy one. Mrs. Couperus lost respect for, and her trust in, the union as her representative, but notwithstanding what can be characterized as some communications problems, I can see no evidence of arbitrary, discriminatory, or bad faith conduct by the union up to January, 1994.
- 47. Similarly, I do not see anything on the facts before me that suggests that Mr. English or Mr. Lemay (or for that matter any of the union representatives involved in the attempt to convince the employer to reinstate the applicant) violated section 69 of the Act in the course of preparing for and representing the applicant at the meeting with the employer on February 4, 1994. Mrs. Couperus testified that she was satisfied that the union was properly prepared to represent her at that meeting and none of the testimony before me supports the proposition that the union was

unprepared for the February 4, 1994 meeting or did not make a good faith effort to persuade the employer to reinstate the applicant into employment on that date. Furthermore, I disagree with the assertion made during argument that the union's decision to take the grievance directly to the third step meeting without meeting with the employer at the first and second steps was a violation of section 69 of the Act. In many (if not most) workplaces subject to a collective agreement, discharge grievances proceed directly to a higher step meeting in recognition of the fact that it is only at those steps that the company has in attendance an individual that can authorize a decision to reinstate an individual. Little is gained by holding first or second step meetings in those circumstances.

- I have, however, significant concerns respecting the testimony of Mr. Lemay regarding the factors that he (and, in the absence of any evidence to the contrary, the other union officials) took into account in determining whether the applicant's grievance would be referred to arbitration. It must be reiterated here that, as the applicant's complaint centres around a discharge grievance, the Board will take a very close look at the reasons offered by union officials to justify the union's decision to not proceed to arbitration. It is incumbent upon the union in this proceeding to put forth a persuasive account as to why the applicant's discharge grievance was not referred to arbitration. When subjected to close scrutiny, the reasons offered by Mr. Lemay do not persuade me that Mrs. Couperus' grievance was fairly considered by the union.
- It is evident from Mr. Lemay's testimony that Mrs. Couperus' somewhat obvious lack of respect for the union and for Mr. Lemay was a factor taken into account by the union when determining that her grievance would not be processed beyond the third step. Mr. Lemay's testimony that the disrespect shown by Mrs. Couperus towards the union and himself was a factor in the union's decision making was given in response to a direct, non-leading question posed to him in cross-examination. His later attempts to deny that Mrs. Couperus' disrespect was a factor were, in my view, made after he had realized the significance of what he had said, and were not credible. As noted above, the testimony of Mr. Lemay was liberally sprinkled with his observations about the applicant's distrust for the union, and himself, and it is entirely consistent with those observations that he would have considered the applicant's lack of respect for him and the union to be relevant to the determination of whether her grievance ought to be referred to arbitration.
- The letter from Mr. Condie to the applicant dated February 11, 1994 supports the conclusion I have reached. The entire letter reflects the union's exasperation with the applicant respecting the efforts made by the union, the employer, and the Workers' Compensation Board, to return her to gainful employment. In light of the applicant's failure to provide adequate medical reports to the employer (particularly in the fall of 1993 and early in 1994), there is no doubt that the feelings of exasperation reflected by Mr. Condie's letter were both shared by other participants in the process (excluding the applicant), and were not unfairly held. It will be recalled, though, that the ill-will held by the applicant towards the union, and the frustration felt by Mr. Lemay towards the applicant, had as its genesis difficulties surrounding the work hardening program. Mr. Condie's letter reads, to a great extent, as a message to Mrs. Couperus that "we are fed up with you on this modified work matter and there is nothing else we can do". But there is no mention made of the insubordination issue which directly led to the discharge of Mrs. Couperus. On balance, the union allowed its frustrations with Mrs. Couperus respecting the work hardening matter to permeate its decision-making regarding her termination grievance.
- 51. There is no doubt that the union, by considering her disrespect for the union and for Mr. Lemay as factors in determining whether Mrs. Couperus' grievance was to go to arbitration, violated section 69 of the Act. The union's conduct was both arbitrary and taken in bad faith, and I so declare.

V. Remedy

52. In my decision dated July 7, 1995, I allowed this application and remitted the matter of remedy to the parties. I will remain seized of this proceeding should it be necessary to rule on the appropriate remedy to be ordered.

1700-95-R Labourers International Union of North America Local 837, Applicant v. Hamilton-Wentworth Roman Catholic Separate School Board, Responding Party

Bargaining Unit - Combination of Bargaining Units - Union applying to combine bargaining units of cleaners and maintenance workers - Board not accepting employer's submission that in exercising its discretion under section 7 of the Act, Board ought to take into account changed labour relations environment caused by government's stated intention to revoke Bill 40 - Application allowed

BEFORE: Roman Stoykewych, Vice-Chair.

APPEARANCES: S.B.D. Wahl and Thomas Troy for the applicant; M. Patrick Moran, Jim LoPresti and Howard Greene for the responding party.

DECISION OF THE BOARD; September 18, 1995

- 1. This is an application pursuant to the provisions of section 7 of the Labour Relations Act. The applicant trade union seeks the combination of a unit of the responding party employer's employees engaged in "maintenance services and plant operations" with a unit of employees engaged as "cleaners". Both units were certified earlier this year in separate proceedings before the Board. In the case of the maintenance and plant employees, the application was in the nature of a displacement application, the employer having been bound to a collective agreement with an employees' association that expired on December 31, 1994. Bargaining has commenced for first collective agreements for both units. At the present time, "no board" reports have been issued with respect to both units.
- 2. Section 7 of the Act provides as follows:
 - 7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.
 - (2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:
 - Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
 - Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made

by the trade union applying for certification for the other proposed bargaining units.

- 3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.
- (3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,
 - (a) would facilitate viable and stable collective bargaining;
 - (b) would reduce fragmentation of bargaining units; or
 - (c) would cause serious labour relations problems.
- (4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,
 - (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
 - (b) the employer's ability to continue to operate those places as viable and independent businesses.
- (5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.
- (6) This section does not apply with respect to bargaining units in the construction industry.
- 3. A hearing was held in this matter on September 6, 1995, which proceeded on the basis of agreement as to facts. The approximately 150 employees in the maintenance services unit are engaged primarily on a full-time basis and perform their duties in the numerous facilities operated by the employer. Their work consists of the performance of various trades functions, maintenance, and cleaning of the facilities operated by the responding party. By contrast, the 140 employees in the caretakers' unit are engaged primarily on a part-time basis, and normally perform their duties only after school and business hours. Their duties appear to be related to the cleaning of the employer's facilities, rather than any ongoing maintenance of its structures.
- 4. There was some dispute with respect to the precise characterization of the work performed by the respective groups, in particular, the extent to which the work of the cleaners resembles the work of the employees classified as "caretakers" in the maintenance unit. As noted above, there are a number of differences in the conditions of their employment. In addition, the cleaners' employment relationship has been administered separately from the maintenance employees, as they have not previously been represented by a trade union. On balance, however, I am satisfied that, to a significant degree, the work the cleaners perform is functionally integrated with the job functions of the caretakers, in that the actual job functions they perform are in many respects similar if not identical. Indeed, the two groups are frequently required to work together as "teams". Thus, while the probability of a "jurisdictional dispute" is somewhat remote in these circumstances, nevertheless I accept counsel for the trade union's position that the overlap of function is a potential, if not actual, source of conflict both in collective bargaining for, and in the administration of, separate collective agreements.

- 5. In his submissions, counsel for the employer candidly (and entirely accurately) conceded that the Board's case law with respect to combination applications did not assist the employer's position in resisting the application in these circumstances. However, it was the thrust of his submissions that the Board, in the exercise of its discretion under section 7 of the Act, ought in various ways to take into account what he characterized as the changed labour relations environment caused by the current government's stated intention to revoke the provisions of "Bill 40", of which the combination provisions are a part. On that basis he urged the Board to deny the applicant's request that the units be combined.
- 6. While the Board's discretion under section 7 is indeed broad, and not restricted to the "enumerated" considerations set out in subsection 7(3), I am not persuaded that it would be appropriate for the Board to exercise its discretion in the manner proposed by the responding party. The Board is an independent, quasi-judicial tribunal statutorily charged with various duties and responsibilities under the provisions of the Labour Relations Act and related legislation. Principal amongst those duties is the application of the legislation to the facts of the applications brought before it. While in its decision-making capacity the Board's role entails the consideration and forwarding of the labour relations policy as it is articulated by the Legislature in the form of legislation, that is something quite different from the implementation of a current government's policy with respect to labour relations. It is open, of course, for the government to pass legislation that would alter the labour relations policy as it is found in the current legislation, at which time the Board will apply such amended legislation and forward the labour relations policies expressed therein. Until such time as new legislation is passed, however, the Board is required to exercise its discretion within the parameters of the legislation currently in effect. In this respect, it would be a serious jurisdictional error, as well as a significant jeopardizing of the Board's adjudicative independence, to consider, in the course of exercising its statutory powers, a government's stated intention with respect to legislation that has yet to pass.
- 7. The employer also asked the Board to consider the declining state of educational sector financing (of which he gave several recent examples), the current emphasis in educational policy placed upon directing funding dollars into the classroom rather than to administration, and, finally, the possibility that the boundaries of school boards may require adjustment in light of certain proposed government initiatives that, counsel stated, were due to be announced imminently. Counsel argued that in these circumstances, it would cause the employer "serious labour relations harm" within the meaning of paragraph 7(3)(c) of the Act were the union's bargaining power to be enhanced by virtue of the combination of the two units.
- 8. While these fiscal, policy and organizational challenges facing the school board are grave indeed, it is clear that, to the extent that they are problems relating to labour relations, they are all founded on the assertion (which, in the immediate circumstances, is not an unreasonable one) that the combination of the two units would enhance the union's relative bargaining strength. However, as was argued by counsel for the applicant, the Board, in the course of applying the combination provisions has been less concerned by the immediate tactical considerations that would ensue upon combination, than upon its effect upon the promotion of viable, stable collective bargaining structures. For this reason, the Board has not generally seen an inquiry into the respective bargaining strengths of the parties occasioned by an alteration of the collective bargaining status quo to be "fruitful" in its assessments of "labour relations harm". (Mississauga Hydro-Electrical Commission, [1993] OLRB Rep. June 523; The Spectator [1995] OLRB Rep. Apr. 559.) I see no reason to depart from the Board's practice in this respect in the present circumstances. Even assuming that the increase in the bargaining power of the union is in some respects objectively measurable, there is no basis upon which to conclude that any disparity in the parties'

respective bargaining strengths is such as to create labour relations problems of the sort that cannot be effectively dealt with in the course of collective bargaining.

- Otherwise, I am satisfied that the combination of these two units would contribute to the formation of a stable and viable collective bargaining relationship not characterized by the fragmentation inherent in a two unit bargaining structure. The employees in what is effectively a parttime cleaners' unit perform work that is analogous and related to the work performed by a substantial number of employees in the largely "full-time" maintenance unit. Given that they already work in significant measure as a "team", the integration of the employees into a single unit would appear to present few logistical difficulties (and none were seriously maintained in argument). Moreover, the consolidation of the two units would likely enhance the employer's flexibility in deploying its work force, while at the same time permitting for the possibility of lateral movement of employees within the combined unit. Further, consolidation would reduce repetitive bargaining, diminish the possibility of disputes relating to the units' respective entitlement to cleaning work, and, more generally, provide a more comprehensive forum for the joint resolution of disputes at the workplace. Finally, the combination of the two units would present obvious administrative efficiencies and conveniences for both parties, in that all administration relating to the employment relationship and to collective bargaining would occur within a single structure. On balance, then, labour relations considerations militate strongly in favour of combination of units in these circumstances.
- 10. Finally, counsel for the employer requested that, in the event that I were to conclude that it was appropriate to combine the two units, that I nonetheless defer the effect of any order until such time as both collective agreements are settled. I am not persuaded that any estoppel-like doctrine is applicable in the present circumstances, nor is it clear to me that any sound labour relations objective would be achieved were the direction to be delayed until the completion of bargaining. It is to be noted that neither collective agreement has been settled and in this respect alone, the circumstances are quite distinct from those facing the Board in *Zeller's Inc.* [1995] OLRB Rep. Apr. 568, where such a direction was contemplated. In the present circumstances, I am not satisfied that constructive collective bargaining would be advanced were it to take place upon a separate basis, but with the knowledge that a combination of the units would ensue imminently. Even less attractive, in labour relations terms, is the prospect of the conclusion of those agreements triggering the negotiation process required by their consolidation. Accordingly, I decline to defer the combination direction as requested by the employer.
- Having regard to the foregoing, then, I am satisfied that these are appropriate circumstances in which to exercise the discretion granted to the Board in section 7 of the Act and to direct the combination of the two units. Accordingly, the Board directs that the following bargaining units:
 - all employees of Hamilton-Wentworth Roman Catholic Separate School Board employed in maintenance and plant operations, save and except area managers, maintenance supervisor, construction supervisor, office and clerical employees and cleaners; and
 - b. all employees of Hamilton-Wentworth Roman Catholic Separate School Board employed as cleaners in the Municipality of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor and office and clerical staff;

be combined into a single bargaining unit described as follows:

all employees of the Hamilton-Wentworth Roman Catholic School Board employed in cleaning and maintenance services and plant operations, save and except area manager, maintenance

supervisor, construction supervisor, persons above the rank of area manager, maintenance supervisor, construction supervisor, and office and clerical employees.

12. The Board shall remain seized of this matter in the event that the parties encounter any difficulties in the implementation of this decision.

1247-95-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173, Applicant v. Niagara Falls Imax Theatre and/or Niagara Falls Theatre Venture, Responding Party v. Bernard Willer, Objector

Bargaining Unit - Certification - Evidence - Practice and Procedure - Union applying to represent bargaining unit of movie projectionists - Issue arising as to craft status of projectionists - Board determining that licensing requirement under *Theatres Act* determinative of skills component of test that union must meet under section 6(3) of the Act - Union's objection to relevance of further questions about specific skills of projectionists upheld

BEFORE: Gail Misra, Vice-Chair, and Board Members R. W. Pirrie and D. A. Patterson.

APPEARANCES: Bernard Fishbein and Larry Miller for the applicant; Hugh Christie, Peggy Pelletier and Sonja McGibbon for the responding party; C. J. Abbass and Bernard Willer for the objector.

DECISION OF THE BOARD; September 28, 1995

- 1. This is an application for certification in which there have been a number of days of hearing held on the issue of the craft status of the projectionists working in the employ of the responding party.
- 2. As noted in our decision of August 4, 1995 (see para. 7), the union called Mr. Jim Walterhouse to give evidence. In the course of cross-examination of Mr. Walterhouse by Mr. Abbass, counsel for the objecting employee, the union made an objection to the line of questioning. Having heard Mr. Fishbein's objection and considered the matter (see para. 8 of August 4, 1995 decision), the Board ruled as follows:
 - "Mr. Fishbein has squarely raised an issue. We want to hear submissions on the next day of hearing about why the licensing requirement under the *Theatres Act* is not determinative of the skills part of section 6(3). If we are persuaded by the union's position and the rest of section 6(3) is satisfied, that may likely be determinative of the bargaining unit description."
- 3. On September 5, 1995 the parties returned to make their submissions on this issue. Section 6(3) of the Act states:
 - 6.-(3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union

practice are commonly associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

- 4. Mr. Fishbein's objection about the relevance of the evidence being elicited on cross-examination was made because he maintains that the licensing requirement in the *Theatres Act*, R.S.O. 1990, c.T.6., makes the projectionists members of a craft by reason of which they are distinguishable from the other employees, especially given the rigour of the licensing requirements under the Act and Regulations. The union argues the *Theatres Act* is a law of general application which prohibits anyone outside of the union's proposed bargaining unit from doing projection work, and to do projection work, one must have a license. That in and of itself makes these employees obviously distinguishable from the rest of the employees at this entertainment venue. The fact that in some provinces projectionists do not need a license is not helpful, it is argued, because it is only in Ontario that this Board has jurisdiction. The union states that the requirements of the *Theatres Act* are analogous to the *Trades Qualification Act*, R.S.O. 1990, c. T.17, from which certified construction craft units flow.
- 5. The *Trades Qualification Act* requires those wishing to be apprentices to apply for apprenticeship in their trade of choice, and to act as apprentices for a period of at least two years. After serving the time required for the trade in question, the apprentice must write the requisite exams to determine competency to the satisfaction of the Director of Apprenticeship. A certificate of qualification in a trade follows the successful completion of a program of apprenticeship.
- 6. Mr. Abbass argued the Board should not uphold the union's objection to his questions because the intervenor and employer will call evidence to show that even if one has to have the license, the projectionists have no technical skills to define themselves as a craft. He argued that if projectionists had been covered by the *Trades Qualification*Act, then there may be support for the union's position. The objecting employee wishes to be able to call evidence of what skills an IMAX projectionist actually needs at this particular workplace.
- On behalf of the employer, it was argued the Board should find the licenses to be relevant but not determinative and the Board should continue to hear evidence of distinguishability. Mr. Christie argued that, at best, the licenses are surrogates for distinguishability and that the Board needs to know how good the surrogate is in this workplace, i.e., how useful is the license in this IMAX theatre. The employer maintains that since it should not be covered by the *Theatres Act*, the license is not important. In addition, it is suggested that at an IMAX theatre projectionists are not required to exercise enough skill to be a craft because IMAX owns the projectors and no one can work on a defective projector except IMAX personnel. The employer asks if it is appropriate to judge the distinguishability of these employees on the basis of what the employer terms "anachronistic legislation".
- 8. Having considered the submissions of the parties we have reached the conclusion that the licensing requirement under the *Theatres Act* is determinative of the skills component of the test the union must meet pursuant to section 6(3) of the Act, and therefore, the union's objection to the relevance of further questions about the specific skills of projectionists is upheld. The facts which we have relied upon and our reasons for this decision follow.
- 9. Some of the relevant sections of the *Theatres Act* are as follows:
 - 1. In this Act,

. . .

standard film means cinematographic film of 35 millimetres or more in width.
• • •
10. Theatres are classified and defined as follows:
1. Class A theatre means premises in which standard film is used to exhibit moving pictures
23. No person shall,

- (a) operate a projector designed for the use of standard film; or
- (b) operate a projector in a Class A or C theatre,

unless the person is licensed as a projectionist under this Act and no licensee, manager or person in charge of a Class A or C theatre shall permit any person to operate a projector in the theatre unless the person is licensed as a projectionist under this Act.

- 24. Projectionist licenses are classified as first class, second class and apprentice.
- 25. An application for examinations and tests for any class of projectionist license shall be made to the Director accompanied by the prescribed fee.
- 10. The Ontario *Theatres Act* requires that projectionists in the type of theatre which is the subject of this application, the IMAX theatre, must be licensed. While there was some suggestion in the employer's submissions that this company does not agree with the governing authorities about whether it falls under the auspices of the *Theatres Act*, it was conceded that the company nonetheless complies with its obligations under this Act. There is no dispute that IMAX film is 70 millimetres in width.
- 11. According to the provisions of the *Theatres Act*, the process to get a projectionist's license is as follows. One must first apply to the Director appointed under this Act (at the Ministry of Consumer and Commercial Relations) for an apprenticeship license. The main qualifications to get this license are that the individual must be 18 years of age or older, provide satisfactory evidence of physical ability to handle projection and fire-fighting equipment, and must provide satisfactory evidence that s/he does not suffer from any physical or mental disability which would prevent the person from operating projection equipment safely (section 28 (3)). Pursuant to Regulation 1031, R.S.O. 1990, section 34(7), an apprentice must then work under the supervision of a licensed projectionist for a minimum of 800 hours to qualify to write an exam.
- 12. There are two sets of exams which qualify one for a Second Class License (for general projection work), or for a First Class License (for more detailed operation of equipment and dealing with more electronics). The Act states that the examinations and tests are designed to determine the competence and ability of the applicant to act as a projectionist in the particular class of license (section 26). Passing the exam gets one the license to act as a projectionist in Ontario in a facility which requires a licensed projectionist in the booth. If one fails the exams and tests, one cannot try the exams a second time without working as an apprentice or second-class license holder for a further period that the Director (appointed under the Act) requires (section 27). If one fails the exams and tests twice, one cannot try again without leave of the Director (section 27).
- 13. Projectionists' licenses are not transferable (section 29). Pursuant to the Regulations, licensed projectionists must have their licence in their possession while on duty at a theatre (sec-

tion 6), must remain on the theatre premises at any time when film is being exhibited in the theatre (section 7(1)), and the projectionist is responsible for ensuring that projection equipment in the theatre is in good repair and in good working condition at all times, and must be in a position to inspect and keep in good repair all film in the theatre which is under the control of the projectionist (section 9).

- 14. Contraventions of the Act are punishable by fines of up to \$25,000 or up to one year in prison for individuals, and fines of up to \$100,000 for corporations (section 58).
- 15. While the employer's argument appears on the surface to have some merit because the Board is being asked to look behind the license, we are not convinced it is necessary to hear extensive evidence about what either the training regime of the apprenticeship entails, or evidence of what aspects of projectionist training are actually utilized in the course of these IMAX projectionists' work. In the final analysis, the Board would still be left with the fact that the Legislature of this province has determined it is mandatory for qualified and licensed projectionists to be the only ones who can operate the film projection equipment in film theatres of the type in question in this case.
- The Board's jurisprudence suggests that the Board has *refused* to grant a craft unit where the individuals in question do not require a license or do not need any formal training. It is clear from the wording of section 6(3) of the *Labour Relations Act* that if the projectionists are not "members of a craft by reason of which they are distinguishable from the other employees", the union would then have to show that the projectionists exercise technical skills which make them distinguishable. However, it is not necessary for both conditions to be met to satisfy the first criterion in establishing craft status.
- 17. From a review of the *Theatres Act* it is apparent to us that the licensing provision in the *Theatres Act* is not a frivolous requirement. The process by which projectionists are licensed is not a *pro forma* one, but has the hallmarks of acquiring a trade or craft. The requirement that *only* licensed projectionists can work in a projection booth to run films in Class A theatres suggests the Legislature's concern that only those persons who have met the criteria set by the government should be responsible for the showing of certain types of film.
- As indicated to the parties in our ruling made on July 27, 1995 (in para. 7 of the August 4, 1995 decision), the Board's jurisprudence on the skills component of the craft status test is clear: the Board has placed emphasis on the distinguishability of the group in question from other employees of that enterprise, having regard to the work done by the members of the group. The nature of the skills used is not the governing factor in the Board's analysis.
- 19. We cannot accept the position taken by the responding party and intervenor that the Board should proceed and hear evidence that even though these projectionists are licensed, they do not have the requisite technical skills to constitute a craft. What we are being asked to do is to accept the license as a mark of distinguishability, but to continue with an inquiry into whether the projectionists exercise technical skills. The relevant portion of section 6(3) states:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees \dots

[emphasis added]

The legislation does not contemplate a union having to meet both criteria, but only one. Since we are satisfied that the union has established the projectionists are the members of a craft and are

therefore distinguishable from the other employees of this employer, it is unnecessary to hear any evidence of the technical skills of these employees at this workplace.

- We do not agree with the employer's argument that the fact of the license is "relevant, but no more" and that the Board needs to hear more about how the *Theatres Act* operates in this workplace. The Board is not in a position to determine the applicability of the *Theatres Act* to this theatre, nor is it in a position to comment on the appropriateness of that legislation's provisions to the IMAX context. The undisputed fact is that at present the *Theatres Act* is being applied at this theatre, and it is not for this Board to consider any other regime which may better fit this business or whether this is the type of theatre contemplated by this Act.
- 21. To state the obvious, the *Theatres Act* is valid law in this province, this responding party is governed by that law, and that law requires that only projectionists who have met provincial standards and who hold a valid license can show films of the sort shown in the responding party's theatre. The Board is therefore satisfied that the projectionists "are members of a craft by reason of which they are distinguishable from the other employees".

1976-95-R Queen's University Faculty Association, Applicant v. Queen's University at Kingston, Responding Party v. Thomas Harris and others, Intervenors

Certification - Pre-Hearing Vote - Board rejecting submission of intervenor in certification application to postpone pre-hearing vote - Board noting that a representation vote should be taken as quickly as is reasonably feasible and practicably convenient for the principal parties, being the applicant trade union and the responding employer

BEFORE: Christopher Albertyn, Vice-Chair, and Board Members W. H. Wightman and G. McMenemy.

DECISION OF THE BOARD; September 20, 1995

- 1. The style of cause is hereby amended to reflect the correct name of the responding party: "Queen's University at Kingston".
- 2. This is an application for certification. The applicant seeks a pre-hearing representation vote. It appears from the records of the applicant and the responding party that not less than thirty-five per cent of the employees in the voting constituency were members of the applicant at the time the application was made.
- 3. On September 6, 1995 a meeting was held between the applicant, the responding party, a Labour Relations Officer of the Board and certain employees. Prior thereto the responding party posted over eighteen notices to employees in the workplace informing them that an application for certification had been made by the applicant and that there would be a meeting with a Labour Relations Officer. The date, time and location of the meeting were stated in the notices.
- 4. During the September 6, 1995 meeting arrangements for a representation vote were discussed. At the meeting an agreement between the applicant and the responding party was con-

cluded that a representation vote would take place on September 27 and 28, 1995, subject to the determination of the voting constituency and the Board's resources.

- 5. A further meeting between the applicant and the responding party was held on September 12, 1995 at which the dates for the representation vote were confirmed as being September 27 and 28, 1995. The voting constituency was defined. By letter to all academic staff of the responding party, the Principal of the responding party advised that the representation vote would take place on September 27 and 28, 1995. That letter was sent to all of the University's academic staff on September 12, 1995.
- 6. The intervenors, by letter of their counsel dated September 13, 1995, now seek a post-ponement of the pre-hearing representation vote. Their argument for wishing to stay the vote to a future date, not before October 9, 1995, is set out in the letter from their counsel dated September 13, 1995, which reads as follows:

Further to our letter of September 11, 1995 and the pre-hearing vote meeting held on September 12, 1995, we wish to advise the Board that we represent not less than 48 faculty members who wish to seek intervenor status (the "intervenor"). The Labour Relations Officer has directed that our submissions regarding that application and the proposed intervenors allegation that the Queen's University Faculty Association (QUFA) should not be certified as a result of the operation of s. 13 of the Labour Relations Act be submitted by September 15, 1995. However, the Labour Relations Board directed that our submissions regarding the dates of the prehearing vote be made by the end of today. We, therefore, make the following submissions.

It is our respectful submission that one of the primary goals of the *Labour Relations Act* and the certification process is to allow the proposed bargaining unit members to exercise their democratic right to vote in favour of or against the certification of the union. One of the pillars of the democratic process is the right to freedom of expression and the opportunity to debate all issues surrounding the proposed certification. It is only after all proposed bargaining unit members are fully apprised of the issues, have had an adequate opportunity to obtain all of the necessary facts, have been able to express their views and debate the issues with others, can they effectively exercise their democratic right to vote. It is our respectful submission that the dates proposed for the pre-hearing vote in this matter, namely September 27 and 28, do not provide for an adequate amount of time for the issues to be addressed, the facts to be disseminated and the proposed bargaining unit members to make an informed decision.

It is our respectful submission that the nature of the institution to which this certification application applies warrants an extension of the proposed dates of the vote to allow for a full and frank discussion and debate of all issues surrounding the certification application. Queen's University at Kingston is an institution of higher learning. One of the fundamental purposes of such an institution is to preserve, protect, promote and provide a forum for the exercise of free speech and debate of all issues, even if controversial. A delay in the vote will allow for a full and frank discussion and debate of all issues surrounding the certification application and its effect if successful, the dissemination of the necessary facts and an expression by those affected of their views to their colleagues. To have a certification vote in an institution such as a university without a full and frank discussion of the issues is, in our respectful view, unconscionable and offensive to natural justice.

QUFA purports to support the democratic process by applying for a pre-hearing vote but has opposed the application by the intervenors for a delay in the vote to allow for a full and frank discussion of the issues, its purported support for democracy must be questioned when it opposes a fundamental component of the democratic process, namely the dissemination of information and the opportunity of those personally and directly impacted by its application, to fully exercise their right to freedom of speech and debate.

The timing of the application for certification and the vote is important in our respectful submission. Many of the proposed bargaining unit members were not at the university until very shortly before the beginning of classes on September 11, 1995. Therefore, many of the proposed

bargaining unit members were unaware of the August 21, 1995 application for certification and the time limit for responding. Further, the first week of classes is a very busy time in the academic year during which many of the proposed bargaining unit members must attend to their teaching responsibilities, including the preparation of lesson plans, and are therefore not able to devote the necessary time to become properly informed and debate the issues surrounding this certification.

It is our understanding that the Applicant takes the position that the application for certification is the culmination of a three year process during which all of the relevant issues have been discussed and debated. However, in our respectful submission, only a small number of the relevant issues have been the subject of debate by the proposed bargaining unit members. The debate that has taken place focused on dispute resolution issues and did not address many of the other issues raised by the certification application. It is these issues to which these submissions relate and which the intervenors wish to ensure are considered by all proposed bargaining unit members prior to a vote.

The delay of the vote will also allow for the student body at Queen's University at Kingston to express their views regarding the certification of the Applicant. While they have no direct involvement and are not a party to these proceedings, at a university institution, the students should be allowed an opportunity, if they choose to do so, to express their views to the proposed bargaining unit members.

The intervenors are content to accept an extension of the time for voting for two weeks. However, it is our understanding from the Labour Relations Board that the Board does not have sufficient human resources available to it to conduct a vote during the second week of October. A vote conducted at any time after that date is acceptable to the intervenors.

The intervenors hereby formally request a delay in the certification vote in the within matter to a time not earlier than the week of October 9, 1995.

- 7. The applicant has filed submissions in response to the intervenors' application for a stay of the representation vote.
- 8. The intervenors filed their From A-3 intervention on September 14, 1995. They seek intervenor status and they oppose the certification of the applicant pursuant to section 13 of the Act.
- 9. On September 15, 1995 counsel for the intervenors amplified by letter the averments made in their Form A-3 application, and made submissions concerning the relevance of section 13 of the Act to this application, in order that the Board grant a hearing at which the matters raised may be fully addressed before any decision on certification is made by the Board.
- 10. By letter on September 18, 1995 the intervenors' counsel informed the Board that the intervenors wish formally to withdraw their challenge to the applicant's certification pursuant to section 13 of the act. The intervenors also withdraw their challenge to the A-4 Declaration. However the intervenors maintain their application for intervenor status and their request for a delay in the pre-hearing vote.
- 11. The normal practice of the Board, and the usual expectation of the labour relations community, is that a pre-hearing representation vote will occur as quickly as is practically feasible, often approximately two weeks after the meeting between the interested parties and a Labour Relations Officer.
- 12. In this case the time period between the meeting between the principal parties and the proposed date of the vote is approximately three weeks, somewhat longer than the Board's usual practice. That longer period was occasioned by relatively substantial administrative arrangements

which need to be made to provide for the relatively large constituency of voters who will be entitled to participate in the representation vote.

- There are compelling labour relations reasons for prompt representation votes. The longer the delay in the taking of a vote, the greater is the opportunity for improper interference in the employees' exercise of their right to freely choose whether or not they wish to be represented by the particular trade union applicant. As stated in *Emery Industries Limited*, [1980] OLRB Rep. March 316:
 - 5.... The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice that might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

See also Associated Toronto Taxi-Cab Co-Operative Limited, [1991] OLRB Rep. July 805; Ontario Hydro, [1991] OLRB Rep. Jan. 83.

- The intervenors seek to suggest that they should be treated differently from other employees by reason of the fact that they are university academics. They suggest that they require more opportunity to discuss the pros and cons of unionization than do ordinary working men and women. The Board is not persuaded that academic staff, as employees of the university, should be treated any differently from other working people who must grapple with the same question, as to whether or not they wish to be represented by a trade union in their relations with the employer. In our view no greater time should be afforded to university academics to make up their minds as to the question they will face in the representation vote than should be allowed to any other working person.
- 15. We are not convinced that a delay in the pre-hearing representation vote is justified. The arrangements for the vote have now been made between the applicant, the responding party and the Field Services Staff of the Board and those arrangements would be unnecessarily disrupted were the vote to be postponed.
- 16. Our view is that a representation vote should be taken as quickly as is reasonably feasible and practicably convenient for the principal parties, being the applicant trade union and the responding employer. That approach best serves a purpose of the Act, which is to ensure the speedy resolution of potential conflict between employers and employees.
- 17. We are satisfied that the intervenors have sufficient interest to be parties to this application and they are granted intervenor status.
- 18. No decision need be made at this stage as to whether a hearing is necessary. That decision is appropriately made after the pre-hearing vote.
- 19. In the circumstances the Board will not interfere in the arrangements reached between the applicant, the responding party and the responsible Labour Relations Officer. The pre-hearing representation vote will accordingly take place, as arranged, on September 27 and 28, 1995. All of those employed in the voting constituency (described in the Appendix hereto) on August 28, 1995 who are so employed on the date the vote is taken will be eligible to vote.

- 20. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.
- 21. The applicant has not yet proved its trade union status before the Board. It will have to do so before the count of the votes. Accordingly the votes will be sealed in the ballot boxes until the union's status has been determined.
- 22. The matter is referred to the Registrar.

[Appendix omitted: Editor]

2119-94-R IWA Canada, Local 2693, Applicant v. Shin Ho Canada Ltd., Solid Wood Research Inc., Responding Parties

Sale of a Business - Board finding sale of "part of a business" where successor having different "purpose" as a business than predecessor, but where successor producing same and similar products, using same machines on same premises aimed at same general market - Application allowed

BEFORE: Laura Trachuk, Vice-Chair, and Board Members R. M. Sloan and D. A. Patterson.

APPEARANCES: Sean Fitzpatrick, W. McIntyre and L. Szkaley for the applicant; Derek L. Rogers, Wolfgang Gericke and Yves Fricot for Solid Wood Research Inc.; no one appearing for Shin Ho Canada Ltd.

DECISION OF LAURA TRACHUK, VICE-CHAIR, AND BOARD MEMBER D. A. PATTER-SON; September 28, 1995

Introduction

1. This is an application under section 64 of the *Labour Relations Act*. The applicant (hereafter the "union") was certified as the bargaining agent for a bargaining unit of employees of Kakabeka Timber Ltd. (hereafter "Kakabeka"). Kakabeka was acquired by Shin Ho Canada Ltd. (hereafter "Shin Ho") in 1988. Kakabeka/Shin Ho negotiated a collective agreement with the union for the period June 1, 1991 to May 31, 1993. In September 1992, Shin Ho closed down the operation and laid off the employees. On April 15, 1994, Solid Wood Research Inc. (hereafter "Solid Wood") leased the premises and the equipment from Shin Ho and commenced an operation at the site. Shin Ho did not participate in this hearing.

The Facts

2. Most of the relevant facts in this matter are not in dispute. The real issue is whether the facts support the applicant's contention that Solid Wood acquired a "part of a business" from Shin Ho. It is Solid Wood's position that it is a "research operation", not a production operation such as Shin Ho ran, and that Solid Wood has therefore not acquired part of Shin Ho's business. It is the union's view that Solid Wood is using the same premises and equipment and producing the same or

a similar product as Shin Ho and has therefore acquired part of its business within the meaning of section 64 of the Act.

- Mr. Wolfgang Gericke testified for Solid Wood. He is the president of five companies 3. referred to as the "Buchanan Group" and, although he has no official position with Solid Wood, appears to be its guiding hand. Mr. Gericke is an enthusiastic man with ambitions for his company and his community. For a number of years he has been interested in finding manufacturing uses for the wood that is left over by the processing of lumber in his mills. He believes that developing uses for this waste wood will create a secondary industry from the sawmills in the area. He was therefore looking for an appropriate location for a research operation. In 1994 he decided to lease the premises and equipment of the former Kakabeka timber mill from Shin Ho and to form Solid Wood Research Inc. He described two main motives for entering into this lease agreement: the price was right and the mill had two state-of-the-art, Weinig planing/molding machines from Germany. Mr. Gericke knew through his research that in Europe many soft woods, considered inferior in North America, are used for high end-value products that the North American market has traditionally only accepted from hard woods or high-grade soft woods. Mr. Gericke wished to try to find some high end-value products that could be made from the "SPF" (Spruce/Pine/Fir) boards of slightly irregular size that are left after wood is processed into lumber in his mills. He wanted to find ways to make "high end-value products" from this wood on a commodity, that is, a high-volume basis. He also, of course, hoped to try to sell whatever products could be developed.
- 4. After leasing the Kakabeka Mill from Shin Ho, Mr. Gericke hired a foremen from one of his other mills to manage the new company. He also asked one of the former Kakabeka managers whether he knew of any good potential employees in the area. He was referred to, and subsequently hired, the two previous planing machine operators, the former knife grinder and two former foremen. Two other people who worked at the mill during Shin Ho's tenure were also eventually hired. At the time of the hearing there were approximately eighteen people working at the mill including management, seven of whom had previously worked for Shin Ho.
- The Kakabeka mill was originally a small lumber mill. However, after Shin Ho bought the operation in 1988 it became a specialized wood-processing operation producing high end-value products, particularly flooring and panelling. It brought in lumber in "cants" which were sometimes dried in the kilns and then cut and planed through the Weinig machines into flooring or panelling. The strips of flooring or panelling were then bundled, shrink wrapped and shipped out or stored. Flooring strips would also be sent through the end-matching machine in the flooring plant. The majority of the Shin Ho operation was directed to the production of flooring but a significant amount of wall panelling was also produced. Shin Ho often used hard wood for its products but some higher-grade pine and other soft woods were also used, particularly for the panelling. Shin Ho had its own salespeople to market and sell its product. During some period of its operation Shin Ho also produced "S4S" (smooth-4-sides) which are basically boards that have been planed. S4S is used to make things like crates and palettes.
- 6. To date, Solid Wood Research mainly produces wall panelling and S4S. Mr. Gericke explained that this is a way to provide some income for the company so that the employees will have steady work. The production and sale of the wall panelling and S4S is supposed to finance at least part of the cost of the research operation. The union's witness testified however, that she spends almost all of her working time producing wall panelling. Mr. Gericke testified that it is about half of the product the company produces. We heard no evidence as to what percentage of Solid Wood's revenue is generated by the panelling. The wall panelling produced is slightly smaller than standard size because the lumber used is slightly smaller than standard. It is made out of "SPF", the undilineated scrap boards of milled spruce, low-grade pine and fir which is dried before

being brought to Solid Wood. Solid Wood is using the Buchanan Group's marketing company in Thunder Bay to market this product. The Board was left with the impression that the product had not yet caught on with customers.

- 7. Solid Wood has also tried to produce many other products some of which have been sold. It has had orders for rose trellising and door jam strips. It has also made drying strips for other Buchanan operations. On the other hand, it has not yet managed to sell any of the irregular size baseboards it can produce but it is working on a modification. Mr. Gericke testified that approximately fifty per cent of Solid Wood's production is S4S, forty-five per cent is wall panelling and that other products account for, at most, five per cent. He suggested that if any product ever does become successful he may move the manufacturing of it to another mill and thus keep Solid Wood as a research operation.
- 8. The actual production of Solid Wood's products, centres around the two planing machines it acquired from Shin Ho. Solid Wood also uses the knife stock that it acquired from Shin Ho although it also designs its own. Solid Wood was fortunate to discover that the person who had been employed by Shin Ho to, among other things, sharpen the knives for the machines, also has a talent for designing them. Specially designed knives are essential for using the planing machines to produce new products.
- 9. The planing machines were also key to Shin Ho's production of flooring and panelling. However, Shin Ho also used the flooring plant equipment, the drying kilns and the some of the saws in the sawmill. Solid Wood has used the flooring plant machinery but only for a few weeks in the summer of 1994. It only uses the drying kilns for storage and it only uses the part of the sawmill where the grinding machine is. It uses a small part of the office building. Solid Wood does use the other equipment in the planing mill where the planing machines are situated, but in a slightly different configuration for more efficient production. It uses the outdoor fork lift and has purchased one for use inside the planing mill. Solid Wood has also added a large strapping machine as the one leased from Shin Ho was found to be inadequate. Solid Wood has put up a new structure where it has a machine that puts wood shavings in bags for sale for such products as beer cases and litter for turkey farms. This project is in the nature of a joint venture with a separate company that put up the capital for the bagging machine.
- 10. The union agreed that the collective agreement and any recall rights employees had under it have expired. There was some correspondence between the union and Solid Wood in the summer of 1994 about these matters. In September 1994 the union made a request to the Minister for a conciliation officer without copying or informing Solid Wood.

Submissions of the Parties

The company argued that it did not acquire a business from Shin Ho. It asserted that Solid Wood is a research operation whereas Shin Ho was a production operation. It acknowledged that both companies produced panelling but that Solid Wood produces it to support its primary function of research and to develop a market that does not yet exist. Shin Ho, on the other hand produced flooring and panelling as the main purpose of its business. The company argued that even though most of the time at least one of the planning machines is in operation it is producing panelling, the most significant work of the operation is the planning and research of different products. It referred to the following decisions of the Board: *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *Penny Lane*, [1993] OLRB Rep. March 230; *Canada Safeway*, [1986] OLRB Rep. March 305; *Ably Concrete Flooring*, [1991] OLRB Rep. May 579; *Raymond Cote*, [1968] OLRB Rep. March 1211.

- The company also argued that the Board should take into account the fact that in September 1994 the applicant made a request to the Minister for conciliation with Shin Ho and did not inform Solid Wood even though it had already asserted that Solid Wood was the successor employer. It appeared that this argument was directed to the question of whether the Board should exercise its discretion to declare that the union continue to have bargaining rights because the union had not acted in good faith.
- The applicant argued that Solid Wood Research is essentially a commercial planing operation just like Shin Ho. It noted that Solid Wood operates on an eight-hour day, five days a week shift and most of that time is spent producing wall panelling which was a product that Shin Ho also produced in significant quantities and which, in any case, is almost identical to the process of producing flooring. It submitted that Solid Wood had acquired the premises and the planing machines through a lease and had therefore acquired a business or part of a business within the meaning of section 64 of the Act. The applicant referred to the following decisions of the Board: Accomodex, [1993] OLRB Rep. Apr. 281; Long Lake Forest Products, [1994] OLRB Rep. Oct. 1343; Paperboard Industries Corporation, [1992] OLRB Rep. Aug. 946 and Hughes Boat Works Incorporated, [1977] OLRB Rep. Dec. 815 (application for judicial review dismissed: (1979) 26 O.R. (2d) 420 (Div. Ct.)).

Decision

14. Section 64 of the *Labour Relations Act* provides as follows:

64.(1) In this section,

"business" includes one or more parts of a business; ("entreprise")

"predecessor employer" means an employer who sells his, her or its business; ("employeur précédent")

"sells" includes leases, transfers and any other manner of disposition; ("vend")

"successor employer" means an employer to whom the predecessor employer sells the business. ("employeur qui succède")

- (1.1) This section applies when a predecessor employer sells a business to a successor employer.
- (2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.
- (2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:
 - 1. A proceeding before the Board under any Act.
 - 2. A proceeding before another person or body under this Act, the Hospital Labour Disputes Arbitration Act, the Crown Employees Collective Bargaining Act, 1993 or the Agricultural Labour Relations Act, 1994.
 - A proceeding before the Board or another person or body relating to the collective agreement.
- (2.2) If the predecessor employer has given or been given a notice relating to bargaining for a collective agreement or has requested the appointment of a conciliation officer or mediator, the

successor employer is considered to have given or been given the notice or to have made the request, until the Board declares otherwise.

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

. . .

- (8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.
- (9) Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.
- (10) A declaration under subsection (6) has the same effect as a certification under section 9.1, for the purposes of sections 5 (application for certification), 58 (application for termination), 60 (termination of bargaining rights), 62 (application for certification or termination) and 125 (application for termination).

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- (12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.
- (13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.
- 15. In these circumstances, as in most of the applications which come before the Board under this section, there is no dispute that a "sale", in this case a lease, has occurred. The dispute is over whether the predecessor has disposed of a business, or a part of a business, to the successor.
- As the decisions the parties have referred to demonstrate, the determination of what is a business or part of a business under section 64 is dependent on the unique combination of facts in each case. That is, there is no set formula or combination of assets, employees, good will, customers etc. which will be determinative. In some cases, all of these factors and others are present, in others only a few. In each case the Board must assess what the factors are that define the particular business in question as well as the relative importance of those factors.
- The analysis may be further complicated when, as here, it appears that what is alleged to have been transferred is "one or more parts of a business". Obviously, taken at its broadest, the transfer of any asset, contract, etc. might be described as part of a business, but transactions of such limited nature are not sales of businesses within the meaning of section 64. The Board's approach to this section is informed by what makes labour relations sense in the circumstances. Therefore, the Board determines whether the elements of the predecessor's operation which have been transferred to the successor are sufficiently coherent in themselves to form part of a business either on their own or as the core of a broader function. In such cases, it makes labour relations sense for a union's bargaining rights to apply to the successor. In *Vaunclair Meats Limited*, [1981]

OLRB Rep. May 581, the Board had to consider whether a meat distribution operation being carried out at the leased site of a former meat purveying operation using some of the former equipment and employees was the transfer of part of a business under section 64 [then section 55] of the Act. The Board found that the transfer of part of a business within the meaning of the Act had occurred and outlined its approach as follows:

24. The Board has always recognized that the meaning to be attached to the word "business" depends to a great extent upon the facts and circumstances in each particular case. It cannot be said that any one fact of an enterprise taken by itself comprises the "business". The business is the "totality of the undertaking", including the physical assets, tools and equipment, management and operating personnel, goodwill, and other intangibles. (See *Raymond Cote*, [1968] OLRB Rep. March 1211.) Thus, in determining whether it is the "business" which has been transferred, the Board has frequently found it useful to consider the extent to which these various elements of the predecessor's business organization have been transferred into the hands of the alleged successor; that is, whether there has been an apparent "continuation of all, or part, of the business - albeit with a change in the nominal owner." Many of these factors which the Board considers were summarized in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed):

"In each case the decisive question is whether or not there is a continuation of the business . . . the factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business."

The issue before the Board, of course, remains whether there has been a "transfer of a business" or "part of a business"; but it is much easier to make that finding, and to conclude that the collective bargaining relationship should be continued, if there is substantial continuity of the other elements of the predecessor's business organization. If the elements formerly used by "A" to carry on business are now in the hands of "B", and are used for the same business purposes, it is difficult to resist the conclusion that there has been some form of transfer "of a business" from "A" to "B". (See also: the remarks of Widgery J. in *Kenmir v. Frizzel et al* [1968] 1 A11 ER 414 - a case arising out of legislation similar to section 55 [now 64].)

25. Most of the cases under section 55 [now 64] involve an alleged sale of a business in its totality. Only a few consider the meaning to be ascribed to the words "part of a business". Yet those words pose much more difficulty than the term business itself. Almost anything actually traceable to the predecessor could be regarded as "part" of its business, but it cannot have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept this view, would make section 55 [now 64] the vehicle for extending rather than preserving bargaining rights. Again, the issue must be considered in the factual context of each case and the Board has found a transfer of "part of a business" where one of a chain of retail stores has been sold to a competitor (Loblaws Groceterias Limited, [1973] OLRB Rep. Jan. 72; More Groceteria Limited, supra); where there was a transfer of certain milk delivery routes in a particular geographic area (Borden Company Limited, [1970] OLRB Rep. Jan. 1244); where there was a transfer of the oil burner and installation service of a firm which was primarily engaged in the sale and delivery of fuel oil. (Automatic Fuels Limited, [1972] OLRB Rep. May 515); and where

a slaughter house, which was formerly part of a much larger integrated meat packing company, was transferred to a new owner, (*Beef Terminal* [1980] OLRB Rep. Aug. 1167). In *Central Native Fisherman's Co-Operative et al*, [1977] 1 Can. LRBR 329, the British Columbia Relations Board found that there had been a transfer of a "part of a business" when a cannery which was formerly part of a much larger business organization was sold to a fisherman's co-operative.

26. In Canac Shock Absorbers [1973] OLRB Rep. Oct. 508 and in Alcan Building Products Limited [1968] OLRB Rep. May 213, the Board dealt with business situations which have a number of similarities to the one presently before us. In Canac, the predecessor was engaged in the manufacture of a variety of product lines, most of which were related to the automobile industry. Its operations were divided into a number of departments. One of these was the shock absorber department, which employed approximately twenty per cent of the predecessor's total production personnel. The predecessor's corporate parent decided to liquidate the predecessor's business, and the shock absorber portion of that business was transferred to Canac which, inter alia, leased machinery, equipment, tools, and that portion of the premises used by the predecessor (Acme Screw and Gear) to produce shock absorbers. The resulting situation was described by the Board as follows (at paragraph 22):

"Canac is presently engaged in the production of shock absorbers, and to that extent is carrying on part of the business formerly operated by Acme. The operation takes place in the same area of the plant as was used by Acme in the production of shock absorbers. The superintendent of the Acme shock absorbers department, and 11 or so other supervisory staff of the company, occupy similar posts in the new company. Canac is, in effect, the shock absorber department of Acme Incorporated, but otherwise continuing in much the same manner before incorporation."

The Board was satisfied that there had been a sale of "part" of a business.

- 27. In Alcan Building Products Limited, a corporate entity was engaged in the production of aluminium products and carried on business through separate divisions, each of which had its own employee complement and produced a variety of product lines. For economic reasons, a decision was made to discontinue one of these divisions. The successor acquired the premises and some of the equipment used by the predecessor (the rest being disposed of to unrelated purchasers), retained a few of the former employees, and continued to produce two products which had accounted for only a small proportion of the predecessor's total production. The Board nevertheless found a sale of "part of the predecessor's business".
- 28. In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization managerial or employee skills, plant, equipment, "knowhow" or goodwill, thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This economic organization undertook activities which give rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, where [sic] preserved. The part of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor's configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement; and but for section [now 64], the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 [now 64] is directed, and the Board was satisfied on the evidence in each case that it should be applied.
- 29. What then are the facts in the present case? It is obvious that "the business" of Vaunclair Purveyors has not been transferred to Vaunclair Meats if by "the business" one means the totality of its organization or the full range of economic activities which the former company carried out "at its zenith" in 1979-80. Much of that activity, and the equipment to carry it out was transferred to the F. G. Bradley Company an entirely independent entity which was an active competitor of Vaunclair Purveyors, and which now continues to serve the Cara customers formerly served by Vaunclair Purveyors. Vaunclair Purveyors, as a corporate vehicle, ceased to carry on any of its former business activities, and currently remains essentially a holding company for

certain real estate and commercial property assets. On the other hand a definable segment of the business formerly carried out by Vaunclair Purveyors continues to be carried on by Vaunclair Meats from the same location, with many of the same assets, some of the same employees, and on behalf of some of the same principals. Indeed, it is difficult to find very much new about it - other than the new corporate vehicle, and even that is currently carrying on a similar kind of business from the same location under the Vaunclair name. Of course, the "new business" operates on a much smaller scale than Vaunclair Purveyors did; but as the Board found in Canac Shock Absorbers, and Alcan Building Products Limited, it is implicit in the term "part of a business" that the "part" may be considerably less than the whole. If, in making a section 55 [now 64] determination, the Board were to give overriding significance to the reduction in the scale of operations, the term "part of a business" could be robbed of all meaning, and virtually written out of the Statute. Likewise, we do not think that we should lightly conclude that there has been a change in the "character" of the business simply because the transferred "part" operates in a new environment, in a somewhat different manner from the way it operated when it was part of the larger organization. This is to be expected of any severed "part", and it would be an unusual entrepreneur who did not initiate any new initiatives, or try to put his own imprint upon his recent acquisition. If a change in circumstances, or scale were sufficient to trigger section 55(5) [now 64], there would be few sales of "part of a business" which could survive its application, and cases such as Canac, Alcan, More Groceteria and Automatic Fuels would have little significance.

- 18. In *More Groceteria Limited*, [1980] OLRB Rep. Apr. 486, the Board found that a company which had acquired a former Loblaws store and some of its employees but no stock, contracts or other elements of the business was a successor under the Act as it had acquired part of a business. In that decision, the Board describes the purpose of section 64 [then section 55] as follows:
 - 15. Section 55 [now 64] of *The Labour Relations Act* is a very important part of the legislation guarding against the subversion of acquired collective bargaining rights and providing some permanence to them in an otherwise volatile commercial context. In the former respect, it is assisted by the various unfair labour practice sections of the *Act* together with section 1(4) which permits the Board to treat as one employer a business carried on through more than one corporation where there is a common control or direction and whether or not these businesses are being carried on simultaneously. An interesting early example of this unfair labour practice aspect of the provision can be found in the important *Thorco Manufacturing Limited* 65 CLLC ¶16,052 case, a case that today could be just as fairly dealt with under section 1(4). However, this purpose of the provisions is not applicable in the facts at hand. We are satisfied that the relationship between the respondent(s) and Loblaws has been arm's length and there is no evidence that the subject commercial transactions were other than for bona fide business purposes.
 - 16. Unfortunately, however, the latter function of the section providing some permanence to collective bargaining rights - is often the most difficult to apply. Here the Legislature has determined that the objectives of labour relations policies require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by protection to the employees from a sudden change in the employment relationship. Indeed, the transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees and their representatives are assured of some real measure of continuity in the collective bargaining process by operation of law. So strong is the bias to this policy that the Supreme Court of the United States arrived at a similar conclusion without the benefit of a specific statutory provision like section 55 [now 64]. See John Wiley & Sons Inc. v. Livingston, [1964] 376 U.S. 543, 84 S. Ct. 909; Goldberg, The Labour Law Obligations of a Successor Employer, [1969], 63 N.W.L. Rev. 735; Note, (1966), 66 Col. L. Rev. 967; Note, (1969), 82 Hav. L. Rev. 418. This ongoing nature of collective bargaining arrangements underlines again that such documents are not "ordinary contracts" nor are they in any real sense the simple products of consensual relationships. See McGavin v. Toastmaster Ltd. v. Ainscough et al [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1 Laskin, C.J.C. It is against these impressive policy considerations that the Board must give meaning to and apply section 55 [now 64].
 - 17. The fundamental issue in cases of this kind is the threshold determination of the section: Has a business been sold? The term "sells" is defined to *include* "leases, transfers; and any other manner of disposition". This all embrasive definition obviously reflects the labour relations pol-

icy considerations discussed generally above. To repeat, collective bargaining rights are not to be treated as co-extensive with commercial ownership and, to this extent, labour law policy seeks to insulate industrial relations from disruption by necessary and inevitable interaction in the market place. The term "business", on the other hand, is simply defined to *include* "a part or parts thereof". No similar exhaustive definition was attempted by the Legislature in recognition, we think, of the great diversity in commercial affairs and the resulting need for a case by case elaboration of the term in the light of labour law policy. A brief perusal of the many factual situations giving rise to the Board's jurisprudence bears testimony to the wisdom of this legislative choice. Accordingly, at the outset of reviewing a few of the cases that have applied the term "business" in the context of retail food stores, it should not be surprising to learn that the Board in determining whether a business has been sold has not deferred to the commercial documentation employed; has not been influenced by the use of intermediary agents to effect transfers; and has made workplace assessments with respect to the continuity of a particular enterprise, activity, or service arriving at conclusions that a court of law in a commercial matter might not arrive at, but conclusions which are fair to both the statute and context under review.

- 19. In these circumstances, the Board also finds that the transfer of part of a business has occurred. Solid Wood is producing the same and similar products as Shin Ho, using the same machines on the same premises aimed at the same general market, that is, purchasers of high end-value wood products, particularly wall panelling. Solid Wood has essentially acquired from Shin Ho the capacity to produce its products and has brought little to the operation, except management expertise, and the Buchanan Group's marketing firm. One would expect any new employer to bring a new management perspective to the acquisition of a company and therefore that change cannot be determinative in the overall context of the business.
- 20. It is true that Solid Wood has a different "purpose" as a business in some respects, than Shin Ho. Solid Wood's stated purpose is to research and develop new high end-value products and specifically wall panelling from inferior soft woods on a commodity basis. Shin Ho's purpose was to produce high end-value products, specifically, flooring and panelling from hard wood and high-grade soft woods. However, although Solid Wood claims that its ultimate purpose is research and development, clearly a significant part of its business is to produce panelling and other "planed" wood products for sale. Therefore, it cannot be said that the entire or even the general character of the business has changed.
- 21. Solid Wood argued, however, that even the panelling production aspect of its business was not the same as Shin Ho's because it used different wood. The Board cannot agree that that difference is significant enough to conclude that at least part of both businesses, that is, the production of panelling, or put more broadly, planed wood products, is not the same.
- 22. Solid Wood also argued that its business was different from its predecessor because it was aimed at a different, and as yet undeveloped, lower-end market. In fact, both companies are selling panelling and other "planed" wood products to consumers, even though one's product is aimed at the "high-end" and the other at the "low-end" market. In any case, the Board has considered a number of cases in which the argument has been made that a business has changed because the successor is aimed at a completely different market even though the service being provided is essentially the same. For example, the Board has decided a number of cases relating to drinking and eating establishments that have changed ownership and been renovated to attract a new and different clientele, and has found that as the business continued to provide alcohol and food to customers it had not changed. (See *Katrina's Tavern*, [1978] OLRB Rep. Sept. 838; and *Krush*, [1987] OLRB Rep. June 859.) The Board finds the same analysis to be appropriate here. Even though the products in question in this case are aimed at the "low end" of the high end-value product market, Solid Wood continues to be in the business of turning pieces of lumber into a marketable product by using particular machinery. We note that a significant factor in the restaurant/bar decisions is the transfer of a licence which allows liquor to be served, just as the machines and equip-

ment at the Kakabeka Mill, particularly the Weinig machines, allow the panelling and other products to be produced.

- The Board has also considered the fact that the planing operation was inactive for approximately two years before it was acquired by Solid Wood. It may be easier in some circumstances to demonstrate that a business or part of one has been transferred when there is no hiatus prior to its acquisition. However, the fact that a significant hiatus has occurred is not a barrier to a finding of successorship under section 64 of the Act. A business may well be closed down for a period of time and then be resurrected either by its former or new owner. In Accomodex Franchise Management, supra, the Board discussed this situation as follows:
 - 72. In cases which arose when the economy was buoyant, or transactions involved a whole, ongoing business, the Board once tended to focus on the dynamic quality of a business or its operation as a "going concern". If that dynamic quality was lacking, the Board was inclined to hold that there had been no transfer of a business but merely a disposition of assets. In more recent years and more troubled economic times, the absence of this dynamic quality has been accorded less significance.
 - 73. Quite apart from questions of successorship, it has become much more common in recent years for businesses (or parts of them) to shut down for periods of time and lay off employees, then reopen again when the market improves - without anyone suggesting that the union's bargaining rights or the employees' recall rights, for that matter, have disappeared. In this era of corporate "restructuring", it has also become much more common for businesses to discontinue or hive off portions of their operation or undertaking, which then become the nucleus or even the entire undertaking of the "new" business organization. If instead of reopening on its own, or reviving this commercially-moribund portion of the operation, it was transferred to someone else - as increasingly happened through receivers - it was much less clear than it once might have been, that bargaining rights should disappear merely because that portion of the idle undertaking was now owned by someone else - especially since the purpose of section 64 is to eliminate the significance of the fact that a new legal entity owns the "things" that have been transferred. Clearly there is a potential tension between commercial law considerations, a layman's view of the "business", and the objectives reflected in the Labour Relations Act, but it has become much less evident in recent years that this tension should be resolved by the Board "reading into" the statute the words "as a going concern", after the word "business" in section 64(2). The concept of a "going concern" and the words "as a going concern" are not unknown in law, but in drafting section 64, the Legislature has not injected that phrase and it is not intuitively obvious that the Board should be doing so as a matter of interpretation. This is not to say that the absence of ongoing activity is irrelevant; merely that it may not be determinative.
 - 74. If a new investor bought the controlling shares in a dormant company with idle assets and brought them to life with an injection of capital, there is little doubt that the union's bargaining rights would continue in respect of that company now that it had become active. A union would not need to invoke section 64 because, although there had to be a "sale of a business" in common parlance and commercial law terms, the legal entity with which it has bargaining rights the "owner" of the assets would be unchanged. Bargaining and collective agreement rights would continue. Should the result be different from a collective bargaining point of view, if the same investor used the same funds to purchase the assets themselves rather than controlling shares in the corporate envelope, but, as before, revived the business as a going concern under new ownership?
 - 75. With the experience of two recent recessions and a considerable amount of corporate restructuring, the Board is less inclined than it once might have been, to give overriding significance to the absence of ongoing business activity at or before the point of alleged "sale". A business shut-down or closure remains significant, but it is not always determinative. As the Board noted recently in *New Dominion Stores*, [1989] OLRB Rep. May 473:

Similarly, hiatus between closure and opening [of a business] is not determinative, but only one factor. The fact that the hiatus between the closure of Dominion Store #986 and the opening of the A & P store was quite long, twenty-two months, does not itself

mean that the business of the former has not been transferred to the successor. There is no temporal bright line beyond which bargaining rights will not transfer. If all the circumstances yield a conclusion that a business, or part thereof, has been transferred, then the appropriate declaration will issue, whether the interval be twelve months or twenty-two months.

Thus, in *Hughes Boat Works Inc.*, [1977] OLRB Rep. Dec. 815 (application for judicial review dismissed: (1979) 26 O.R. (2d) 420 (Div. Ct.)), the predecessor "North Star" encountered economic difficulties, ceased operations ("went out of business" in layman's terms) and closed its plant which was transferred after several months by a receiver to "Hughes" which began to build boats again. Hughes claimed that the predecessor's business had failed - as demonstrated by the plant closure - and that it had merely purchased the asset shell. But the Board found that Hughes was a successor employer within the meaning of section 55 [now 64] of the Act.

- 24. In these circumstances, the majority finds that Solid Wood has acquired and revived part of Shin Ho's business and is therefore a successor employer under section 64. Solid Wood has acquired from Shin Ho the ability to manufacture its products which are the same or very similar to those Shin Ho itself produced. The acquisition of the mill, the Weinig and other wood-processing machinery amounts to the acquisition of a part of Shin Ho's business which is necessary for Solid Wood to carry out its own wood planing operation. Furthermore, Solid Wood is utilizing the same processes and employee skills utilized by Shin Ho to produce a very similar product. Solid Wood brought almost nothing to the enterprise except a different long-term goal. Almost all of the work performed is the same or similar to that performed under Shin Ho. Only the president and Mr. Gericke, and to some extent the knife grinder/designer, devote any part of their time to "research". As the part of the business which has been transferred is being used to generate essentially the same kind of work as was previously performed for Shin Ho, it makes labour relations sense to declare that the union's bargaining rights apply to the new entity.
- 25. The Board was not persuaded that the union's failure to copy Solid Wood in its request for a conciliation officer should affect the exercise of our discretion. There was no evidence or even any allegation that failing to inform Solid Wood of the request had had any prejudicial effect on the responding party.
- 26. For the foregoing reasons, the majority finds that there has been a sale of part of the business of Shin Ho Canada Ltd. to Solid Wood Research Inc. and that the union's bargaining rights continue in the new entity.

DECISION OF BOARD MEMBER R. M. SLOAN; September 28, 1995

- 1. I strongly dissent from the majority decision.
- 2. I contend that the majority decision is fundamentally flawed in finding that a sale of a business took place there was no existing business to sell. Kakabeka Timber Limited ceased operations completely in September, 1992.
 - For all intents and purposes, the commercial operation of Kakabeka Timber Limited literally ceased to exist as of its closing in September 1992.
 - Seniority and recall rights for all former bargaining unit employees of Kakabeka Timber Limited covered by the existing collective agreement became void in 1994 in accordance with section 12.06 of the then existing collective agreement.

- There were some continuing collective agreement obligations as of September 1992, but these also ceased when the collective agreement between the applicant and Kakabeka Timber Limited expired on 31 May, 1993 and was not renewed.
- The lease between Kakabeka Timber Limited and Solid Wood Research Inc. supports this reality (that the former business is defunct) where it covers all of the property, ". . . all buildings and structures thereon and all equipment therein. . ." for a term of 5 years.
- 3. It is abundantly clear that Solid Wood Research Inc., leased from Kakabeka Timber Limited property that was not part of an operating business; buildings and structures that were not part of an operating business; and equipment that was not part of an operating business. Nor, with reference to the property, buildings and structures, did the Board hear any evidence that there was any intention by Kakabeka Timber Limited to reactivate these operations at any future date. The clear facts that we had to deal with point conclusively to a defunct and effectively "dead" operation. How can the majority find that a transfer of a business occurred when it is manifestly clear that there was no business to transfer? Even if the majority can overcome that hurdle, there is still the overwhelming evidence that the Solid Wood Research Business is now and has been from the outset totally different in concept, goals, and ultimately product from Kakabeka Lumber Limited.
- 4. The respondent readily and candidly admits that some of its current operations are similar to work previously done by the defunct Kakabeka Timber Limited, using, not surprisingly, equipment rented in their lease agreement.
- 5. The majority decision concentrates solely on this one, temporary situation, to find that a sale of a business has occurred.
- 6. I believe that a reference in Sack and Mitchell's Ontario Labour Relations Board Law and Practice, section 6-2300, P.337 demonstrates the argument aptly and succinctly, where it quotes from *Metropolitan Parking Inc.*:

"A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a "going concern", something which is "carried on". A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets".

(emphasis added)

- 7. The indicia for the sale of a business are many and varied and it is clear that save for the argument which I cannot agree with with respect to part of the work performed, none of the indicia are present to support the findings of the majority.
- 8. Referring again to the Sack and Mitchell publication, we find under section 6-2400, p.338 the following:

In Culverhouse Foods Ltd., the Board indicated that there are countless factors that might assist it in its analysis as to whether there has been a continuance of a business:

En route to a determination of the above essential questions the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good

name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries a significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.

(emphasis added)

- 9. It is significant to note that in each and every one of the indicia underlined above not a single one supports the finding of a sale of a business under the Act. While it may be true that none of the indicia is significant on its own with respect to the ultimate determination of the sale of a business, the fact that none of the indicia apply to the circumstances of this case should signify conclusively that a sale of a business did not take place.
- 10. The respondent's position is fully supported by the recent Board decision in *Zeller's Inc.*, *Woolworth Canada Inc.*, Board File 2907-94-R dated August 17, 1995 (unreported) [now reported at [1995] OLRB Rep. Aug. 1141] at paragraphs 15, 16, 17 and read as follows:
 - 15. The threshold question to be determined is whether there was a sale of a business. The Act defines the terms "business" and "sale" broadly so as to include entities and transactions which bear little resemblance to their counterparts at common law. As the Board has noted in many cases, the purpose of these broad categories is to ensure that the integrity of the collective bargaining process is not undermined by changes in the form of the enterprise. Having said that however, it is also clear that the two categories have their limits. "Sale" does not include all transfers or dispositions, nor does the term "business" refer to all undertakings or forms of production.
 - 16. In Accomodex Franchise Management, [1993] OLRB Rep. April 281, the Board stated that a "business" is a commercial vehicle rationally constructed to produce certain goods or services for a defined market. In St. Leonard's Society of Metropolitan Toronto, [1993] OLRB Rep. Jan. 56, the Board described its conception of "business", as an instrumental one as opposed to a functional one. Put plainly, this means that the business consists of various components such as employees, assets, body of work etc. and the relationships that exist between the constituent components. This instrumental formulation of "business" is contrasted with what has been described in the jurisprudence as the "functional" formulation, referring only to the purpose of the business or the work itself which is performed. Support for this distinction is drawn from the Supreme Court of Canada in Syndicat national des employes de la Commission scolaire regionale ed l'ourtouais (CSN) v. Union des employes de service local 298 (FTO), Bibeault et al. [1988] 2 SCR 1048. Relying on the same authority, the Board has observed in Parnell Foods Limited [1992] OLRB Rep. Dec. 1164, that the instrumental as opposed to the functional approach has now been adopted in all Canadian jurisdictions.
 - 17. The significance of the Board's adoption of an instrumental analysis is that the applicant must demonstrate that something more has been disposed of from the predecessor to the successor employer than simply the function of performing the same work. The applicant must go further and prove that an operational entity consisting of constituent components and particular relationships between those components has passed from predecessor to successor employer. There are of course varying degrees to which this may occur and the term "business" in section 64(1) is defined to include one or more parts of a business. As the Board noted in Accomodex at paragraph 58, the more the successor employer's ability to carry on business is derived or is dependent upon things which were acquired from the predecessor employer, the more likely a transfer of a business has taken place.

- 11. With respect to those employees hired by Solid Wood Research none of these persons "continued to work" for Solid Wood Research, but were hired as new employees including those persons who had previously been employed by Kakabeka Timber and whose employment with this latter company ended unequivocally with the expiration of their right to any recall which occurred in advance of Solid Research entering into the leasing agreement.
- 12. Quoting again from Sack and Mitchell, section 6-2400, P.341:

There are limits, however, to the extent to which section [63] can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section [63] cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section [63] serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity it transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

(emphasis added)

- 13. Since there has been no: sale of; transfer of; or lease of; a business, then on the facts of this case the application should fail, and the application for certification under File No. 2914-94-R should be processed in the normal manner.
- 14. The certification application was not before this panel and I am not finding fault with the majority decision which does not address the matter, but as the panel had been made aware of the pending application at the outset of the hearing I believe that it is appropriate for me to raise the fatal effect that this decision will have on that application.
- 15. A group of employees at Solid Wood Research Inc. have filed an application for certification as the Solid Wood Research Employees Association in File No. 2941-94-R and in that same file IWA Canada, Local 2693 has filed an intervention claiming that it already represents the employees that are the subject of the certification application by operation of successorship.
- 16. The decision of the majority is, in my view, in error, and presents in the first instance an injustice to Solid Wood Research, and this injustice is compounded by the clear abrogation of the rights of the employees as legislated in section 2.l(1) of the *Labour Relations Act* which reads:
 - 1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join *and be represented by a trade union of their choice* and to participate in the lawful activities of the trade union.

(emphasis added)

- 17. One can only conjecture as to the reaction of the employees when they read this decision and realize the serious consequences for them in thwarting their attempt to freely choose their manner and form of representation.
- 18. I would dismiss this application in its entirety, finding that in the circumstances of this application a sale of a business did not take place within the meaning of the Act.

2079-95-M United Steelworkers of America, Applicant v. Videolux Canada Inc., Responding Party

Discharge - Interim Relief - Remedies - Unfair Labour Practice - Union making unfair labour practice complaint in respect of discharge of member of union's bargaining committee and seeking interim reinstatement - Board not accepting employer's submission that balance of harm weighing in its favour because union already certified and because union delayed 17 days in bringing application and because of its assertion that it had no more work for electricians - Application allowed - Board directing that employee be reinstated pending disposition of unfair labour practice complaint

BEFORE: S. Liang, Vice-Chair, and Board Members W. H. Wightman and C. McDonald.

APPEARANCES: Mark Rowlinson and Brando Paris for the applicant; David Cowling and Jean-Michel Ouzzan for the responding party.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER C. McDONALD; September 8, 1995

- 1. This is an application for interim relief made pursuant to the provisions of section 92.1 of the *Labour Relations Act*.
- 2. In this application, the union requests the reinstatement of Michel Elbaz to his former position with the company, pending the disposition of a related complaint under section 91 of the Act. The union also seeks further relief restoring certain terms and conditions of employment, and prohibiting management from discussing the union with its employees.
- 3. Turning first to the case as its relates to Mr. Elbaz's employment, it was not seriously disputed and the Board finds that there is an arguable case that Mr. Elbaz's activities in connection with the union played a role in the termination of his employment. There are certainly factual issues in dispute, but there is also an ample basis for the case to be heard.
- 4. The main dispute between the parties concerns the issue of the balance of harm. The union asserts that interim relief is necessary in this case for a number of reasons. The union was certified on July 11, 1995 to represent a unit of employees of this employer. Mr. Elbaz was instrumental in the organizing drive and continues to play a key role in the union's activities. He is one of two employee members elected to the bargaining committee. He is bilingual, an asset in a workplace where both French and English are spoken. Bargaining has yet to commence, although the union wrote to the company on July 17th requesting certain information for the purposes of formulating bargaining proposals.
- 5. The company does not dispute that there may be some labour relations harm as a result of the removal from the workplace of Mr. Elbaz. However, it asserts that where the action occurs after the union has been certified, such harm is considerably diminished. The company also suggests that the fact that the union waited for 17 days after the termination of Mr. Elbaz's employment to file this application undercuts any urgency asserted by the union. In all the circumstances, it is submitted that the harm to the union is minimal and is outweighed by the harm to the company should this application be granted. On this latter point, the company states that it would cause it undue hardship if it were compelled to reinstate Mr. Elbaz because it simply no longer requires his position. Mr. Elbaz first came to the company in November of 1993 as an electrician,

to work on the start-up of the company. The start-up work has been completed. In its submissions, the company stated that "there is no more work for electricians".

- 6. The declaration of the company states that no one has been hired to replace Mr. Elbaz in his capacity as electrician, and that in fact, no employees have been hired by the company since the date of the termination of his employment.
- 7. In Earnway Industries (Canada) Ltd., [1994] OLRB Rep. Nov. 1511, the Board directed the reinstatement of 23 employees pending the hearing of an unfair labour practice complaint. In that case, the employer asserted that these employees had been laid off for economic reasons. In the course of its reasons, the Board alluded to the necessity that an allegation of lack of work be established clearly and persuasively, preferably through supporting documentary evidence. We agree with those sentiments. In previous cases, the Board has referred to the necessity that declarations filed in support of a position taken on interim relief be as complete and detailed as possible, particularly where the facts can be presumed to be within a party's knowledge: see for instance, Metropolitan Toronto Apartment Builders Association et. al, [1993] OLRB Rep. Mar. 219. This is no less true where an employer asserts that it has no work available for an employee whom it has terminated.
- 8. In the case before us, it is not disputed that Mr. Elbaz initially came to work for this company as an electrician for the purposes of working on the start-up of this company. It is not disputed that the work for which he had originally been retained ended in September of 1994, and that he was further retained after that to perform both electrical and general maintenance duties. In late February, Mr. Elbaz was told that his employment would be terminated in a week, although he was asked whether he would be willing to continue to work for the company at a considerably reduced wage. When Mr. Elbaz informed the company that he could not afford to work at the wages offered, his services were terminated. It is agreed that the termination of his services was at least partly for financial reasons. The company also asserts that it had told Mr. Elbaz previously that it might no longer require his services.
- 9. Shortly after the termination of his employment, Mr. Elbaz had a conversation with the owner of the company, Jean-Michel Ouzzan, in which he asked whether he could come back to work for the company since he was unable to qualify for unemployment insurance without at least twenty weeks of work. The company agreed to take him back to work, at a wage rate negotiated between Mr. Elbaz and Mr. Ouzzan. There is a dispute as to whether the parties agreed to a fixed 20-week contract, or whether there was an understanding that it might continue beyond twenty weeks.
- There is also a dispute about the nature of Mr. Elbaz's work during the period of March 7th, when he returned to work for the company, and August 11th when his employment was terminated. However, it can generally be said that the electrical portion of his duties were much less than they had been when he was first hired by the company, and the maintenance portion of his duties were a significant element of his work.
- It is difficult to assess without more detailed evidence the claim that Mr. Elbaz's position was no longer required. It seems to be the case, and the union does not dispute this, that the company no longer needs the services of a full-time electrician. However, there is nothing to indicate that it no longer requires those maintenance services that Mr. Elbaz had been providing. Presumably, these services are now being performed by other employees of the company. It appears that Mr. Elbaz's work has therefore been "absorbed" by other members of the work force. How significant or onerous a burden would it be to this company to return Mr. Elbaz to work, on an interim basis, to continue with those duties he had been performing prior to his discharge? In

assessing this, it is relevant to note that when Mr. Elbaz requested twenty weeks of work from the company, *after* his services had been terminated, the company seemed to have little trouble finding him work, as long as the price was right. It was prepared to accommodate him in his request for work, even though at the same time it states that the electrical needs of the company have been gradually decreasing, and even though in January of 1995, it put Mr. Elbaz on notice that it might no longer require his services as an electrician.

- 12. The issue of whether there is an economic justification for the termination of Mr. Elbaz's employment may well be before the panel that determines the merits of the unfair labour practice complaint. At this juncture, however, the Board is not satisfied in all of the circumstances that it would be unduly onerous for the company to return Mr. Elbaz to work pending the hearing of that complaint.
- 13. We are in agreement that the labour relations harm and impact of the termination of employment of a key union supporter will differ depending on the stage in the collective bargaining relationship at which it occurs. Where such actions occur following certification, where the union's bargaining rights are established, clearly the effect of them is not as compelling as when they occur in the midst of an organizing effort. But it is also not to be understated. As the Board has stated elsewhere, the success and viability of collective bargaining and the life of a trade union depends on the willingness of employees to participate in its activities. Even once a union has been certified, the success of collective bargaining may well turn on the willingness of employees to support a union's efforts to reach a first agreement, to participate in the formulation of bargaining proposals and strategies and to assist in ensuring that an employer is respecting the rights of its employees under the Act. The willingness of an employee to participate in any of these activities is undermined by a perception that union supporters are met with adverse consequences.
- 14. It may be easier for an employer to establish that the harm it will suffer should the Board impose interim reinstatement of an employee outweighs the type of harm to the union's interests, where the actions take place after bargaining rights are established. But in the case before us, we are not convinced that the harm to this employer outweighs that to the union. In the circumstances, we are also not convinced that the 17 day delay in filing this application, from the date of the termination of Mr. Elbaz's employment, is of such significance that it changes our assessment of the harm.
- Turning to the other relief sought, the Board is not convinced that these other matters warrant relief at this time. The delay in complaining about them is greater, and there is less reason to think that they will have any significant impact on the union's interests and on the employees in the workplace. Further, the concern of the union with respect to the employer's alleged improper communications with employees (which for the most part seem to involve Mr. Elbaz) can be met in these circumstances through a posting of a Board notice.
- 16. Accordingly, the Board makes the following interim orders, which are in effect until the disposition or resolution of the unfair labour practice complaint in Board File No. 2078-95-U:
 - (a) an order reinstating Michel Elbaz to the position he held as of August 11, 1995; and
 - (b) an order that the Board Notice as set out in Appendix "A" hereto shall be posted in conspicuous places in the workplace.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; September 8, 1995

- 1. The "start-up" work was initially performed by Mr. Elbaz as an independent contractor until September of 1994 when he became an employee. His employment as an electrician ended in February 1995, when he declined to accept continued employment in a capacity other than that of an electrician and at a substantially lower rate of pay.
- 2. As indicated in paragraph 9 of the main decision, the next evidence is that of Mr. Elbaz approaching Mr. Ouzzan with a problem. Mr. Elbaz required twenty weeks of covered employment to enable him to qualify for unemployment insurance benefits. Mr. Ouzzan was not the first, and in all likelihood will not be the last, employer to accede to such a request. I am prepared to accept that Mr. Ouzzan acceded to the request with what he regarded as a compassionate response to a cry for help rather as a disregard for the spirit of the *Unemployment Insurance Act*.
- 3. In any case, the events which followed will likely ensure that in the future Mr. Ouzzan will defend the integrity of the Unemployment Insurance Account by not accommodating job applicants whose stated objective is to qualify for U.I. benefits. Moreover, it should also serve to get the union-management relationship at Videolux off to a flying start.
- 4. I had understood the intent of the provision for interim relief under section 92.1 was to address "mischief" in the course of organizing efforts. By accepting the invitation to apply the provision post-certification the Board brings the legislative concept into further disrepute. Just as parties learned to use the provision for "leave to prosecute" as a means of drawing the Board into their disputes, it has become the case, even more quickly, that the provision for "interim relief" is being used in a similar fashion with the result that the Board appears to be integral to the problem.
- 5. We were able to offer the parties dates to hear the merits of this case well in advance of the September 18 date agreed upon. I would have denied the application and set hearing dates peremptorily beginning within five working days.

Appendix ...

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

THE BOARD HAS ORDERED VIDEOLUX CANADA INC. TO REINSTATE MICHEL ELBAZ UNTIL THE BOARD DECIDES WHETHER THE TERMINATION OF HIS EMPLOYMENT WAS LEGITIMATE.

A HEARING BEFORE THE BOARD IS SCHEDULED TO BEGIN ON MONDAY, SEPTEMBER 18, 1995. THE PURPOSE OF THAT HEARING IS TO DETERMINE WHY MICHEL ELBAZ WAS TERMINATED FROM EMPLOYMENT.

IF THE BOARD IN THE END DECIDES THAT THE REASONS FOR THE TERMINATION OF EMPLOYMENT HAD NOTHING TO DO WITH THE UNION. THEN THE TEMPORARY REINSTATEMENT ORDER WILL BE REVOKED AND THE COMPANY WILL NO LONGER HAVE TO EMPLOY MICHEL ELBAZ.

IF THE BOARD IN THE END DECIDES THAT THE TERMINATION OCCURRED BECAUSE OF MICHEL ELBAZ'S UNION

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH ARE PROTECTED BY LAW:

AN EMPLOYEE HAS THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER OWN CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

AN EMPLOYEE HAS THE RIGHT TO CAST A SECRET BALLOT IN FAVOUR OF. OR IN OPPOSITION TO. A TRADE UNION IF THE ONTARIO LABOUR RELATIONS BOARD DIRECTS A REPRESENTATION VOTE.

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BY AN EMPLOYER OR A TRADE UNION OR A REPRESENTATIVE OF AN EMPLOYER OR A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT INCLUDING ATTENDING A HEARING AS A WITNESS OR A POTENTIAL WITNESS.

AN EMPLOYEE HAS THE RIGHT TO REMAIN NEUTRAL, TO REFUSE TO SIGN DOCUMENTS OPPOSING THE UNION OR TO REFUSE TO SIGN A UNION MEMBERSHIP CARD.

IF AN EMPLOYEE IS PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING FOR EXERCISING ANY OF THESE RIGHTS. A COMPLAINT MAY BE FILED WITH THE ONTARIO LABOUR RELATIONS BOARD.

This is an official notice of the Board and must not be removed or defaced.

DATED THIS 8TH DAY OF SEPTEMBER, 1995.

COURT PROCEEDINGS

3583-92-R; 3584-92-R (Court File No. M16331) The Corporation of the Town of Ajax, Applicant (Respondent) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 222 (Moving Party), Charterways Transportation Limited and Ontario Labour Relations Board, Respondents

Sale of a Business - Judicial Review - Union Alleging "sale of a business" where municipality cancelling its contract with transit company and "taking back" operation of municipality's transit system - Transit company found in earlier Board decision to be federal undertaking - Labour Relations Act amendments providing in section 64.1 that successor rights provisions applying to federal-to-provincial sales, but amendments coming into force only on January 1, 1993 - Respondents asserting that transaction occurred on December 31, 1992 and that section 64.1 of the Act having no application - Respondents also denying that transaction amounting to "sale of a business" - Board satisfied that by acquiring substantial part of work force previously employed by transit company, municipality transferring to itself an essential element of that business - Board concluding that municipality's hiring of employees on and after January 1, 1993 triggering sale and that section 64.1 of the Act applying to the transaction - Board finding and declaring sale of a business - Municipality applying for judicial review - Divisional Court quashing decision of the Board - Court of Appeal granting union's application for leave to appeal

Board decision reported at [1994] OLRB Rep. Oct. 1296 and at [1995] OLRB Rep. Feb. 95. Divisional Court decision reported at [1995] OLRB Rep. June 907.

Court of Appeal for Ontario, Osborne, Weiler and Austin JJ.A., September 12, 1995.

The Court: Leave to appeal is granted. Costs in discretion of panel hearing the appeal.

0087-90-R; 0888-90-R (Court File No. 680/94) Heritage Green Senior Centre, Applicant v. Service Employees' International Union, Local 532, Ontario Labour Relations Board and Ontario Ministry of Health

Abandonment - Bargaining Rights - Crown Transfer - Judicial Review - Sale of a Business - Ministry of Health revoking nursing home's licence, taking over nursing home and operating it for 3 years - Ministry of Health calling for and receiving proposals for licensed beds lost due to earlier revocation and awarding beds to a number of licensees, including "HG" - Board finding that part of Crown undertaking had been transferred to "HG", that there were valid bargaining rights to be transferred and that an intermingling of employees had occurred - Board finding that predecessor's collective agreement would have applied at time "HG" started combined operation in 1991 without a vote had *Crown Transfer Act* been applied as it should have been - Evidence not supporting submission that union had abandoned its bargaining rights - Application under *Crown Transfer Act* allowed - Employer's application for judicial review dismissed by Divisional Court

Board decision reported at [1994] OLRB Rep. April 418.

Ontario Court of Justice (Divisional Court), O'Leary, McRae and Corbett JJ., September 28, 1995.

O'Leary J. (endorsement): Assuming, but without so deciding, that the Board had to be correct in deciding that there was a transfer from the Crown to an employer and that the SEIU was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer, we are of the view that the Board was correct in making these findings.

Whether or not there was such a transfer was basically a factual matter and there was in our view ample evidence to support the finding that there had been a transfer of a part of an undertaking from the Crown to Heritage Green.

As to the bargaining agent issue, Heritage Green submits that the SEIU had no valid collective agreement with the Crown, for SEIU was not capable of being a valid bargaining agent in a collective agreement with the Crown.

Whether or not authorized to do so by statute, the Crown had in fact recognized the SEIU as the bargaining agent for the nursing home employees, and had signed 2 extention agreements of the collective agreement while the Crown operated the nursing home. We have no doubt if the issue had ever been raised before the Ontario Public Service Labour Relations Tribunal or the Labour Relations Board or the Courts, the decision would have been that because the SEIU had been accepted by the Crown as the bargaining agent, then the collective agreement was binding and the SEIU was in fact the bargaining agent. The Board not the Court would have left the workers unprotected. There was then a "bargaining agent in respect of employees employed in the undertaking immediately before the transfer" to Heritage Green. I quote the words of Sec 4(1) of the Successor Rights (Crown Transfer) Act and the agent was the SEIU. This finding is made by the Board in paragraph 50 of its reasons and in our view it was correct in its finding.

The issues of intermingling, and geographic boundaries are within the discretion of the Board and certainly the Board did not act unreasonably. The application is therefore dismissed with costs to SEIU fixed at \$3,000.00.







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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3698-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Dingwell's Machinery & Supply Limited (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of Dingwell's Machinery & Supply Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of the Dingwell's Machinery & Supply Limited in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0437-94-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Bradscot Construction Limited, Bradscot Limited, Bradscot Management Limited, Bradscot Northern Limited, Bradscot Western Limited, and Bradscot (MCL) Ltd., R. D. Painting and Alberto Henriques Painting & Decorating (Respondents)

Unit: "all painters, and painters' apprentices in the employ of Bradscot Construction Limited, Bradscot Limited, Bradscot Management Limited, Bradscot Northern Limited, Bradscot Western Limited and Bradscot (MCL) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters, and painters' apprentices in the employ of Bradscot Construction Limited, Bradscot Limited, Bradscot Management Limited, Bradscot Northern Limited, Bradscot Western Limited and Bradscot (MCL) Ltd. in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0652-94-R: Laundry & Linen Drivers and Industrial Workers Local 847 Affiliated with the International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America (Applicant) v. The Salvation Army Toronto Addictions and Rehabilitation Centre, Industrial Services (Respondent)

Unit: "all employees of The Salvation Army Toronto Addictions and Rehabilitation Centre, Industrial Services, employed in its Production Department and Main Store at 496 Richmond Street West, in the Municipality of Metropolitan Toronto, save and except Assistant Supervisors, Assistant Store Managers, persons above the ranks of Assistant Supervisor and Assistant Store Manager, office, clerical, administrative and accounting staff, Salvation Army Officers, persons enrolled in programs offered by The Salvation Army, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons in bargaining units of which any trade union held bargaining rights as of May 19, 1994" (26 employees in unit) (Having regard to the agreement of the parties)

2841-94-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. James Johnston Mechanical Contracting Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of James Johnston Mechanical Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and

steamfitters' apprentices in the employ of James Johnston Mechanical Contracting Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2909-94-R: Service Employees International Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. First Choice Haircutters Ltd. (Respondent)

Unit: "all employees of First Choice Haircutters Ltd. in the City of Brantford, save and except the Manager and the Assistant Manager" (15 employees in unit)

3054-94-R: The Ontario Pipe Trade Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Eagle Mining Contractors and Eagle Mining Contractors Inc. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Eagle Mining Contractors and Eagle Mining Contractors Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Eagle Mining Contractors and Eagle Mining Contractors Inc., in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

3534-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Eastern Power Developers Corp. (Respondent) v. International Brotherhood of Electrical Workers, Local Union 353 (Intervener)

Unit: "all employees of Eastern Power Developers Corp. engaged in the operation of cranes, shovels, bull-dozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees Eastern Power Developers Corp. engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0636-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Maray Construction Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of Maray Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of Maray Construction Ltd. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, and the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

0754-95-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Con-Force Structures Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Con-Force Structures Limited in the indus-

trial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Con-Force Structures Limited in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman' (2 employees in unit)

0767-95-R: United Food & Commercial Workers International Union (Applicant) v. Jacques Lavallee c.o.b. as Lavallee Esso Tiger Express & Car Wash (Respondent)

Unit: "all employees of Jacques Lavallee c.o.b. as Lavallee Esso Tiger Express & Car Wash in the Regional Municipality of Sudbury, save and except Assistant Managers, persons above the rank of Assistant Manager and Bookkeeper/Accountant" (21 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

0816-95-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Fort William Golf & County Club (Respondent)

Unit: "all ground staff employees, including the mechanic, employed at the Fort William Golf & Country Club in the City of Thunder Bay, save and except the grounds superintendent (also known as the greenskeeper) and persons above the rank of the grounds superintendent" (35 employees in unit) (*Clarity Note*)

1143-95-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent)

Unit: "all employees of Famous Players Inc. employed at the 400 Drive-in Theatre in the City of Vaughan, save and except Relief Managers, persons above the rank of Relief Manager and employees in the bargaining unit represented by Local 173 I.A.T.S.E." (24 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1162-95-R: Ontario Public Service Employees Union (Applicant) v. Windsor Regional Hospital (Respondent) v. Service Employees' Union, Local 210, Ontario Nurses' Association (Interveners)

Unit: "all allied health professionals of Windsor Regional Hospital (Met Campus) in Windsor, Ontario, save and except Professional Medical Staff, Department Heads, Managers, Assistant Managers, Directors, Assistant Directors, Supervisors and those above the rank of Supervisor, Interns and Students and employees covered by subsisting collective agreements" (50 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1173-95-R: Canadian Union of Public Employees (Applicant) v. Arbor Living Centers (Respondent)

Unit: "all employees of Arbor Living Centers employed as office and clerical staff in the Town of Newmarket, save and except Supervisors, persons above the rank of Supervisor, Registered and Graduate Nurses, Physiotherapist, Occupational Therapist and persons in bargaining units for which any trade union held bargaining rights as of June 19, 1995" (2 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1257-95-R: Canadian Union of Public Employees (Applicant) v. Nelson House of Ottawa-Carleton (Respondent)

Unit: "all employees of Nelson House of Ottawa-Carleton in the Regional Municipality of Ottawa-Carleton, save and except Co-ordinator, persons above the rank of Co-ordinator and Administrative Assistant" (16 employees in unit) (Having regard to the agreement of the parties)

1339-95-R: Teamsters Local Union 938 (Applicant) v. E.H. Cartage Company Ltd. (Respondent)

Unit: "all employees of E. H. Cartage Company Ltd. working in and out of the City of Mississauga, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff" (7 employees in unit)

1343-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of

the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States Canada and its Local 800 (Applicant) v. Schokbeton Quebec Inc. and Beton Pre Fabrique (Respondents)

Unit: "all journeymen and apprentice plumbers and pipefitters in the employ of Schokbeton Quebec Inc. and Beton Pre Fabrique in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice plumbers and pipefitters in the employ of Schokbeton Quebec Inc. and Beton Pre Fabrique in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1377-95-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Les Constructions H.G.B. Inc. (Respondent)

Unit: "all journeymen and apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers apprentices in the employ of Les Constructions H.G.B. Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers, sheeters' assistants and material handlers in the employ of Les Constructions H.G.B. Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, and the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1379-95-R: Ontario Nurses' Association (Applicant) v. Cledic Enterprises Ltd. c.o.b. as Parisien Manor Nursing Home (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Cledic Enterprises Ltd. c.o.b. Parisien Manor Nursing Home in the City of Cornwall, save and except Director of Care and persons above the rank of Director of Care" (7 employees in unit) (Having regard to the agreement of the parties)

1395-95-R: Service Employees Union, Local 268 (Affiliated with the S.E.I.U., A.F. of L., C.I.O., and C.L.C.) (Applicant) v. The Corporation of the Township of Dubreuilville (Respondent)

Unit: "all employees of The Corporation of the Township of Dubreuilville in the Township of Dubreuilville, employed at the Dubreuilville Ambulance Service, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of July 4, 1995" (7 employees in unit) (Having regard to the agreement of the parties)

1422-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Glen-Con Construction Ltd. (Respondent)

Unit: "all construction labourers, in the employ of Glen-Con Construction Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1458-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. EPQ Construction Company Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of EPQ Construction Company Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of EPQ Construction Company Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geo-

graphic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1459-95-R: United Steelworkers of America (Applicant) v. J.M.P. Maintenance Ltd. (Respondent)

Unit: "all employees of J.M.P. Maintenance Ltd. at its location at 1385 Woodruffe Avenue, in the City of Nepean, save and except supervisors and persons above the rank of supervisor" (23 employees in unit) (Having regard to the agreement of the parties)

1461-95-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Irvine Foods Inc. Operating as Collegeway IGA (Respondent)

Unit: "all employees of Irvine Foods Inc. operating as Collegeway I.G.A. at 3355 The Collegeway in the City of Mississauga, save and except assistant store manager, persons above the rank of assistant store manager, and customer service manager/head cashier" (42 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1466-95-R: Service Employees Union, Local 210 (Applicant) v. St. Joseph's Health Services Association of Chatham Incorporated, Operating as St. Joseph's Hospital (Respondent)

Unit: "all lay office and clerical employees of St. Joseph's Health Services Association of Chatham Incorporated, Operating as St. Joseph's Hospital, regularly employed for not more than 24 hours per week in the City of Chatham, save and except Supervisors, persons above the rank of Supervisor, confidential secretaries to the Executive Director, Assistant Executive Directors, Director of Nursing and Director of Human Resources, students employed during the school vacation period, students employed during co-op work terms and persons for whom any trade union held bargaining rights as of July 12, 1995" (25 employees in unit) (Having regard to the agreement of the parties)

1471-95-R: Union of Needletrades, Industrial & Textile Employees (UNITE) (Applicant) v. National Carpet Mills Inc., a division of National FibreTech Inc. (Respondent)

Unit: "all employees of National Carpet Mills Inc., a division of National FibreTech Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, and persons for whom a trade union held bargaining rights as of July 10, 1995" (36 employees in unit) (Having regard to the agreement of the parties)

1514-95-R: United Steelworkers of America (Applicant) v. 126517 Canada Inc., carrying on business as Carleys Fashions (Respondent)

Unit: "all employees of 126517 Canada Inc., carrying on business as Carleys Fashions, located in the City of Ottawa, save and except Assistant Managers and persons above the rank of Assistant Manager" (16 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1523-95-R: Teamsters Local Union 938 (Applicant) v. Atlas Alloys, a Division of Rio Algom Limited (Respondent)

Unit: "all employees of Atlas Alloys, a Division of Rio Algom Limited, in the Township of Walden, save and except supervisors, persons above the rank of supervisor, office, sales, technical and clerical employees, and students employed during the school vacation period" (7 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1529-95-R: Syndicat des Communications Graphiques, Local 41M (Applicant) v. Mutual/Hadwen Imaging Technologies Inc. (Respondent)

Unit: "all employees of Mutual/Hadwen Imaging Technologies Inc. engaged in pre-press and mailing work at 11424 Michael Street and 2211 Thurston Drive in the Regional Municipality of Ottawa-Carleton, save and except forepersons and persons above the rank of foreperson" (37 employees in unit) (Having regard to the agreement of the parties)

1534-95-R: International Association of Heat and Frost Insulators and Asbestos Workers' Local 95 (Applicant) v. E.S. Fox Limited (Respondent)

Unit: "all journeymen and apprentice insulators and asbestos workers in the employ of E.S. Fox Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice insulators and asbestos workers in the employ of E.S. Fox Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1536-95-R: United Food and Commercial Workers International Union (Applicant) v. Ryding - Regency Meat Packers Ltd. (Respondent)

Unit: "all employees of Ryding - Regency Meat Packers Ltd. in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, and office and clerical staff" (47 employees in unit) (Having regard to the agreement of the parties)

1537-95-R: Canadian Union of Public Employees (Applicant) v. Extendicare (Canada) Inc., West End Villa (Respondent)

Unit: "all office and clerical employees of Extendicare (Canada) Inc., West End Villa, in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office co-ordinator, and persons for whom a trade union held bargaining rights as of July 18, 1995" (6 employees in unit) (Having regard to the agreement of the parties)

1543-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Gateway Manufacturing Corporation (Respondent)

Unit: "all employees of Gateway Manufacturing Corporation in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and students employed during the school vacation period" (33 employees in unit) (Having regard to the agreement of the parties)

1571-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Latta Crane Services Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of Latta Crane Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of Latta Crane Services Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, and the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1572-95-R: United Steelworkers of America (Applicant) v. DEW Engineering and Development Limited (Respondent)

Unit: "all employees of DEW Engineering and Development Limited in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (65 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1573-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation employed at the Pickering Town Centre, 1355 Kingston Road, in

the City of Pickering, save and except forepersons and persons above the rank of foreperson" (15 employees in unit) (Having regard to the agreement of the parties)

1619-95-R: International Association of Machinists and Aerospace Workers (Applicant) v. Canadian Council on Smoking and Health (CCSH) (Respondent)

Unit: "all employees of Canadian Council on Smoking and Health (CCSH) employed in the Region of Ottawa-Carleton, save and except the Director of Clearing House and persons above the rank of Director of Clearing House" (19 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1622-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Impact Building Maintenance Services Limited (Respondent)

Unit: "all employees of Impact Building Maintenance Services Limited engaged in cleaning at 151 Yonge Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, carpet cleaners and parking lot sweepers" (16 employees in unit) (Having regard to the agreement of the parties)

1624-95-R: Teamsters Local Union 938 (Applicant) v. Skanna Systems Investigations Inc. (Respondent)

Unit: "all employees of Skanna Systems Investigations Inc. in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (23 employees in unit) (Having regard to the agreement of the parties)

1625-95-R: Teamsters Local Union 91 (Applicant) v. Anchor Concrete Products Limited (Respondent)

Unit: "all employees of Anchor Concrete Products Limited in the Corporation of the Township of Kingston, save and except foremen, persons above the rank of foreman, clerical, office and sales staff" (23 employees in unit) (Having regard to the agreement of the parties)

1675-95-R: Service Employees Union, Local 210 (Applicant) v. Leamington United Mennonite Home and Apartments (Respondent)

Unit: "all employees of the Leamington United Mennonite Home and Apartments in the Town of Leamington, save and except supervisors, persons above the rank of supervisor, registered nurses, hair dressers, adjuvant, office and clerical staff, and students employed during the school vacation period" (57 employees in unit) (Having regard to the agreement of the parties)

1721-95-R: United Steelworkers of America (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation employed in cleaning services at Bramalea City Centre, 25 Peel Centre Drive in the City of Brampton, save and except forepersons and persons above the rank of foreperson" (18 employees in unit) (Having regard to the agreement of the parties)

1722-95-R: United Steelworkers of America (Applicant) v. Intercon Security Limited (Respondent)

Unit: "all Security Officers in the employ of Intercon Security Limited at the Bramalea City Centre, 25 Peel Centre Drive, in the City of Brampton, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff" (12 employees in unit) (Having regard to the agreement of the parties)

1774-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Fibre Resource Recovery Corp. (Respondent)

Unit: "all employees of Fibre Resource Recovery Corp. in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, drivers, office, clerical and sales staff" (41 employees in unit) (Having regard to the agreement of the parties)

1777-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Four-0-Four Towing Service Ltd. (Respondent)

Unit: "all owner-operators, tow truck drivers and dispatchers employed by Four-0-Four Towing Service Ltd. in the City of Markham, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff" (3 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1778-95-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Captain Towing Ltd. (Respondent)

Unit: "all owner-operators, tow truck drivers and dispatchers employed by Captain Towing Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff" (2 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1797-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at Madame Vanier Children's Services, 871 Trafalgar Street in the City of London, save and except forepersons and persons above the rank of foreperson" (2 employees in unit) (Having regard to the agreement of the parties)

1799-95-R: Service Employees Union, Local 183 (Applicant) v. Quinte Manor Retirement Home (Respondent)

Unit: "all employees of Quinte Manor Retirement Home in the Township of Hallowell, save and except Assistant Managing Director, persons above the rank of Assistant Managing Director, Dietary Manager, office and clerical staff' (11 employees in unit) (Having regard to the agreement of the parties)

1801-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Apollo 8 Maintenance Services Limited (Respondent)

Unit: "all employees of Apollo 8 Maintenance Services Limited at 95 St. Clair Avenue West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (12 employees in unit) (Having regard to the agreement of the parties)

1809-95-R: L.I.U.N.A., Local 607 (Applicant) v. ACZ Contractors Limited (Respondent)

Unit: "all construction labourers in the employ of ACZ Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1823-95-R: Canadian Union of Public Employees (Applicant) v. Disabled Persons' Community Resources Integrated Housing Program (Respondent)

Unit: "all employees of the Disabled Persons' Community Resources Integrated Housing Program in the Regional Municipality of Ottawa-Carleton, save and except Co-ordinators, persons above the rank of Co-ordinator, and the Administrative Assistant" (41 employees in unit) (Having regard to the agreement of the parties)

1867-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. 2woMor Publications Inc. (Respondent)

Unit: "all employees of 2woMor Publications Inc., at 545 St. Lawrence Street in the Town of Winchester regularly employed for not more than 24 hours per week, save and except Co-Publishers, persons above the rank of Co-Publisher and persons in bargaining units for which any trade union held bargaining rights as of August 11, 1995" (5 employees in unit) (Having regard to the agreement of the parties)

1898-95-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Sani Metal Ltd. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Sani Metal Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Sani Metal Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1926-95-R: Sheet Metal Workers' International Association, Local Union 562 (Applicant) v. Allen Simpson Marketing & Design Ltd. (Respondent)

Unit: "all employees of Allen Simpson Marketing & Design Ltd. in the City of Guelph, save and except foremen, persons above the rank of foreman and clerical staff" (14 employees in unit) (Having regard to the agreement of the parties)

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

4429-94-R: Ontario Nurses' Association (Applicant) v. Porcupine Health Unit (Respondent)

Unit: "all casual nurses employed by the Porcupine Health Unit, in the Districts of Cochrane, Timiskaming and Algoma, save and except the Director of Nursing, the Supervisors of Nursing and the Director of Home Care (10 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	4

Applications for Certification Dismissed Without Vote

3768-92-R: Ontario Public Service Employees Union (Applicant) v. Barnes Security Services Ltd. (Respondent) v. United Steelworkers of America (Intervener) v. Group of Employees (Objectors)

4650-94-R: International Brotherhood of Electrical Workers, Local Union No. 636 (Applicant) v. Lakeport Beverages, a division of Lakeport Brewing Corporation (Respondent)

0999-95-R: United Food & Commercial Workers International Union (Applicant) v. Oshawa Group Limited, c.o.b. as Dutch Boy Food Markets (Weber Street) (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0407-92-R: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Valleriani Masonry Ltd. (Respondent) v. Bricklayers, Masons Independent Union of Canada, Local 1 (Intervener)

Unit #1: "(1) all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Valleriani Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Valleriani Masonry Ltd. in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; (2) all bricklayers' assistants in the employ of Valleriani Masonry Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	9
Number of segregated ballots cast by persons whose names appear on voters' list	9
Ballots segregated and not counted	9

1193-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Monroe Auto Equipment Co. of Canada (Respondent)

Unit: "all employees of Monroe Auto Equipment Co. of Canada in the City of Owen Sound, save and except Department Heads, persons above the rank of Department Head, technical staff, office and clerical staff and students employed during the school vacation period" (360 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list Number of persons who cast ballots	331
Number of ballots excluding segregated ballots cast by persons whose names appear or	l
voter's list	319
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	143
Number of ballots marked against applicant	175

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1673-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. C. Villeneuve Construction Co. Ltd. (Respondent)

Unit: "all employees of C. Villeneuve Construction Co. Ltd. engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing and maintaining of same, and employees engaged as surveyors, truck drivers, and labourers working at or out of the Township of Way, save and except non-working forepersons and persons above the rank of non-working foreperson, and labourers covered pursuant to the terms of any subsisting collective agreement" (6 employees in unit)

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	47
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	40

0691-95-R: Industrial and Commercial Workers' Union ILGWU (Applicant) v. Exeltherm Inc. (Respondent)

Unit: "all employees of Exeltherm Inc. in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, office, clerical, and sales staff" (21 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	20
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	17

0704-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Canadian Medical Laboratories Limited (Respondent)

Unit: "all employees of Canadian Medical Laboratories Limited in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, senior customer services representative, laboratory services representative, office and sales staff and pending resolution by the Board, excluding as well, team captains and coordinators" (49 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list Number of persons who cast ballots	48 43
Number of ballots excluding segregated ballots cast by persons whose names appear on	45
voter's list	40
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	3

1016-95-R: International Association of Machinists and Aerospace Workers (Applicant) v. Alzar Industries Inc. and Alfin Aluminum Finishes Inc. (Respondents)

Unit: "all production employees of Alzar Industries Inc. and Alfin Aluminum Finishes Inc. in the City of Nepean, save and except foremen, persons above the rank of foreman, and office and clerical staff" (25 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	3

Applications for Certification Withdrawn

3290-94-R: United Steelworkers of America (Applicant) v. Bramalea Centres Limited (Respondent) v. Canadian Union of Professional Security Guards and North American Security Services Inc. (Interveners)

0432-95-R: Labourers' International Union of North America, Local 625 (Applicant) v. Bravo Cement Contracting (Windsor) Inc. (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local 598 (Intervener)

0737-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. S & R Car Rentals Toronto (Central) Ltd. (Respondent)

0964-95-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. S & S Electric, a Division of 694270 Ontario Ltd. (Respondent)

1142-95-R: Ontario English Catholic Teachers' Association (Applicant) v. The York Region Roman Catholic Separate School Board (Respondent)

1460-95-R: United Steelworkers of America (Applicant) v. Cadillac Fairview Corporation Limited (Respondent) v. Intercon Security Limited, Hurley Corporation (Interveners)

1587-95-R: International Union of Operating Engineers Local 796 (Applicant) v. The Toronto Hospital, Western Division (Respondent) v. Canadian Union of Public Employees Local 1744 (Intervener)

1598-95-R: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Canadian Wearparts Limited (Respondent)

1642-95-R: Practical Nurses Federation of Ontario (Applicant) v. The Victorian Order of Nurses - Middlesex-Elgin Branch (Respondent)

1668-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Petro-Canada Lubricants Centre (Respondent)

1698-95-R: United Food & Commercial Workers International Union (Applicant) v. Burns International Security Services Ltd. (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

1750-95-R: Service Employees Union, Local 478 (Applicant) v. Englehart & District Hospital Inc. (Respondent)

1924-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Towland-Hewitson Construction Limited (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

4324-94-R: Teamsters Local Union 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. Dufferin-Custom Concrete Group (A Division of St. Lawrence Cement Inc.), McCowan Mobile Mix (A Division of St. Lawrence Cement Inc.), Peterborough Ready Mix (A Member of Dufferin-Custom Concrete Group Central Division, - A Division of St. Lawrence Cement Inc.), Port Hope Ready Mix (A Member of Dufferin-Custom Concrete Group Central Division, - A Division of St. Lawrence Cement Inc.), Dufferin-Custom Concrete Group (A Division of St. Lawrence Cement Inc.), (Respondent) (Endorsed Settlement)

4325-94-R: Teamsters Local Union 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. ESSROC Canada Inc. (Respondent) (Endorsed Settlement)

4430-94-R: Ontario Nurses' Association (Applicant) v. Porcupine Health Unit (Respondent)

0762-95-R: United Food and Commercial Workers International Local 175 (Applicant) v. Stewart's I.G.A. (Respondent) (*Granted*)

1163-95-R: Ontario Public Service Employees Union (Applicant) v. Windsor Regional Hospital (Respondent) v. Ontario Nurses' Association (Intervener) (*Granted*)

1174-95-R: Canadian Union of Public Employees (Applicant) v. Arbor Living Centers (Respondent) (Granted)

1401-95-R: Local 429 of the Retail, Wholesale and Department Store Union District Council of the United Food & Commercial Workers International Union (Applicant) v. Jessel Foods Inc. (Respondent) (*Granted*)

1409-95-R: Graphic Communications International Union, Local 500M (Applicant) v. Manerwood Press Limited (Respondent) (*Granted*)

1467-95-R: Service Employees Union, Local 210 (Applicant) v. St. Joseph's Health Services Association of Chatham Incorporated, Operating as St. Joseph's Hospital (Respondent) (*Granted*)

1588-95-R: International Union of Operating Engineers Local 796 (Applicant) v. The Toronto Hospital Western Division (Respondent) (Withdrawn)

1595-95-R: Ontario Public Service Employees Union (Applicant) v. Ross Memorial Hospital (Respondent) (Granted)

FIRST AGREEMENT - DIRECTION

2026-95-FC: Canadian Union of Public Employees (Applicant) v. ABC Infant and Toddler Centre of Ottawa (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0781-94-R: **0782-94-R**: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Masonry Contracting Ltd., Odex Masonry Ltd. and Falcon Masonry (Respondents); Labourers' International Union of North America, Local 1059 (Applicant) v. Classic Masonry Contracting Ltd., Odex Masonry Ltd. and Falcon Masonry (Respondents) (*Dismissed*)

3996-94-R: Ontario Public Service Employees Union (Applicant) v. Windsor Regional Hospital (Respondent) v. Service Employees Union, Local 210 (Intervener) (*Granted*)

0663-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Imperial Oil Limited (Respondent) v. Christopher Biron, Shamir Mehta, Mandy Tokarczyk (Intervener) (*Withdrawn*)

0844-95-R: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Kennedy Masonry Company Limited and Don Valley Masonry Ltd. (Respondent) (*Endorsed Settlement*)

0985-95-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Ebbinghaus Electric Limited, Robby/Ebbinghaus Ltd. (Respondents) (*Endorsed Settlement*)

1184-95-R: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, The Windsor Local 1684 (Applicant) v. Windsor Glass Company Limited and Windsor Glass Company (1992) Limited (Respondents) (*Endorsed Settlement*)

1251-95-R: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., a division of Royplast Limited, Royal Plastics Group Limited, Joseph Liberman, Stephen Cork, Vittorio De Zen (Respondent) (Withdrawn)

SALE OF A BUSINESS

0781-94-R; **0782-94-R**: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Masonry Contracting Ltd., Odex Masonry Ltd. and Falcon Masonry (Respondents); Labourers' International Union of North America, Local 1059 (Applicant) v. Classic Masonry Contracting Ltd., Odex Masonry Ltd. and Falcon Masonry (Respondents) (*Dismissed*)

2907-94-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Zellers Inc., Woolworth Canada Inc. (Respondents) (*Dismissed*)

3996-94-R: Ontario Public Service Employees Union (Applicant) v. Windsor Regional Hospital (Respondent) v. Service Employees Union, Local 210 (Intervener) (*Granted*)

0844-95-R: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Kennedy Masonry Company Limited and Don Valley Masonry Ltd. (Respondent) (*Endorsed Settlement*)

0985-95-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Ebbinghaus Electric Limited, Robby/Ebbinghaus Ltd. (Respondents) (*Endorsed Settlement*)

1184-95-R: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, The Windsor Local 1684 (Applicant) v. Windsor Glass Company Limited and, Windsor Glass Company (1992) Limited (Respondents) (*Endorsed Settlement*)

1469-95-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. P. & J. Steel Erectors Ltd., Milan Steel Erectors Inc., Mick Joksimovic, Miljan Joksimovic (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

1742-95-R: Hospitality & Service Trades Union Local 261 (Applicant) v. Beaver Foods Limited, Atomic Energy, Chalk River (Respondent) (*Granted*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

1279-95-R; 1281-95-R: Ensign Security Services Inc. (Applicant) v. United Steelworkers of America, and Canadian Security Union (Respondents) (*Granted*)

1417-95-R: Paragon Protection Ltd. (Applicant) v. United Steelworkers of America, and Canadian Security Union (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0119-95-R: Shawn Lackey on his own behalf and on behalf of others (Applicant) v. Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Respondent) v. Cara Operations Limited (Airline Services Division, Gloucester) (Intervener)

Unit: "all employees of Cara Operations Limited at its Airline Services Division in Gloucester, save and except Assistant Manager, persons above the rank of Assistant Manager, Flight Kitchen Supervisors, Trucking Supervisor, Customer Service Supervisor, office staff and Chefs" (72 employees in unit) (Withdrawn)

0321-95-R: Jeff Carscadden (Applicant) v. International Brotherhood of Electrical Workers, Local 586 and The IBEW Construction Council of Ontario (Respondents) v. Megatech Electrical Ltd. (Intervener)

Unit: "all registered electricians and apprentices of the employer in all sectors of the construction industry in the Province of Ontario, save and except those working in the residential sector in the Counties of Carleton, Lanark, Prescott, Russell and Renfrew in the Province of Ontario all registered electricians and apprentices of the employer in the residential sector of the construction industry in the Counties of Carleton, Lanark, Prescott, Russell and Renfrew in the Province of Ontario" (2 employees in unit) (*Granted*)

0382-95-R: David Harris (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Yorkwood Investments Limited (Intervener)

Unit: "all of its own construction employees engaged in the on-site construction of all types of low-rise housing only and their natural amenities while working in the County of Simcoe and in O.L.R.B. Geographic Area No. 8, namely the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except employees employed as non-working foremen, watchmen and engineering staff" (1 employee in unit) (*Granted*)

0449-95-R: Scott D. Gadsdon (Applicant) v. The International Brotherhood of Electrical Workers, Locals 303, 105, 115, 120, 353, 402, 530, 586, 773, 804, 894, 1687, 1739; The International Brotherhood of Electrical Workers; and the IBEW Construction Council of Ontario (Respondents) v. Robert Burk and Son (Intervener)

Unit: "all electricians and electricians' apprentices in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (1 employee in unit) (*Granted*)

0473-95-R; 0474-95-R: Dwayne Anderson (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions, Labourers' International Union of North America, Local's 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081, and 1089 (Respondent) v. Northdale Contractors Inc. (Intervener); Gord Botaitis (Applicant) v. Labourers' International Union of

North America, Ontario Provincial District Council and its affiliated Local Unions, Labourers' International Union of North America, Local's 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081, and 1089 (Respondent) (*Granted*)

0495-95-R: John MacDonald (Applicant) v. Sheet Metal Workers' International Association, Locals 30, 47, 235, 269, 537, 392, 397, 473; 504, 539, 562 and Ontario Sheet Metal Workers & Roofers Conference (Respondent) v. Sand-Mark Sheet Metal Limited (Intervener)

Unit: "all certified sheet metal journeymen and registered apprentices in the employ of Sand-Mark Sheet Metal Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, excluding non-working foremen, and persons above the rank of non-working foreman" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

0548-95-R: Union Employees of I.C.C. Reprographics (Applicant) v. Teamsters Local 419 (Respondent) v. I.C.C. Reprographics Ltd. (Intervener)

Unit: "all employees of the Company in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (Granted)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	21
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	15

0558-95-R: Dan Nantais (Applicant) v. International Association of Machinists & Aerospace Workers (Respondent) v. Mettler-Toledo Inc. (Intervener)

Unit: "all employees at its London Branch office, save and except Service Supervisors, persons above the rank of Service Supervisor and office and sales staff" (5 employees in unit) (Granted)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	5
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	3

0906-95-R: Daniel Ouellette (Applicant) v. Sudbury Mine, Mill and Smelter Workers' Union, Local 598 (Respondent) v. Mansour Mining Supply Inc. (Intervener)

Unit: "the employees of Mansour Mining Supply Inc., save and except supervisors, those above the rank of supervisors, office staff, sales staff, security guards and janitorial staff in the geographical location of the District of Sudbury" (48 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	40
Number of segregated ballots cast by persons whose names appear on voter's list	3

Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	22
Number of ballots marked against respondent	17
Number of ballots segregated and not counted	4

1574-95-R: Lynda Abreu RN (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Shelburne Residence (Nursing Home) (Intervener) v. Group of Employees (Objectors) (Withdrawn)

1605-95-R: Vernon Mangroo (Applicant) v. The United Steel Workers Union (Respondent) v. Goshen Rubber Canada (Intervener) (Withdrawn)

1620-95-R: Brenda Myketa (Applicant) v. Office and Professional Employees International Union (Respondent) v. North of Superior Association for Community Living (Intervener) (*Granted*)

1621-95-R: Eric Martel (Applicant) v. Hospitality & Service Trades Union, Local 261 (Respondent) v. Princess Street Development (Kingston) Inc. (Intervener) (Withdrawn)

1695-95-R: The employees in the Union of CEP local 333-09 at Trivision Electronic Inc. (Applicant) v. Communication, Energy and Paper Workers Union of Canada and its Local 333-09 (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1577-95-U: Professional Association of Canadian Theatres ("PACT") (Applicant) v. Canadian Actors' Equity Association ("Equity"), Christopher Marston, Ronald Haney, Christine Haley, Miriam Newhouse, Jim Biros, Gail Benn, and David Caron (Respondent) (Withdrawn)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1200-93-U: Service Employees' Union, Local 210 (Applicant) v. Leamington District Memorial Hospital (Respondent) (Dismissed)

2930-94-U: Maureen Schrader-Clair (Applicant) v. Canadian Union of Public Employees, Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener) (*Dismissed*)

3203-94-U: Ontario Public Service Employees Union and its Local 252 (Applicant) v. Ministry of the Solicitor General and Correctional Services (Niagara Detention Centre) (Respondent) (*Withdrawn*)

3524-94-U: Labourers' International Union of North America, Local 1089 (Applicant) v. Hiawatha Horse Park and Entertainment Centre and James Wesley Henderson and James Robert Henderson (Respondents) (Withdrawn)

3687-94-U: Arnold Hudson, David Stevenson, Rick Toth, Glen Bates and Brian Spearin (Applicant) v. Canadian Union of Public Employees (Local 109), and The Corporation of the City of Kingston (Respondents) (*Dismissed*)

3815-94-U: United Steelworkers of America (Applicant) v: Bramalea Centres Limited (Respondent) (Withdrawn)

4446-94-U: Mrs. Imogene Davis (Applicant) v. Service Employees' International Union Local 204 (Respondent) (Withdrawn)

0082-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. K & Son Maintenance Co. Inc. (Respondent) (*Granted*)

- **0102-95-U:** The Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources (Respondent) (Withdrawn)
- **0377-95-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Corporation of the Township of Gosfield North (Respondent) (*Withdrawn*)
- **0407-95-U:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. J.G. Contracting Ltd. (Respondent) (*Granted*)
- **0660-95-U:** Francis A. Yarde (Applicant) v. Algoma Ore Division (Respondent) v. United Steelworkers of America (Intervener) (*Dismissed*)
- **0841-95-U:** Marie Luciow (Applicant) v. United Steelworkers of America Local 8777 and Pan Abrasives Inc. (Respondents) (*Dismissed*)
- **0861-95-U**: Teamsters Local Union 230, affiliated with the International Brotherhood of Teamsters (Applicant) v. Essroc Canada Inc. (Respondent) v. Teamsters Local Union 931, Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Interveners); Ssroc Canada Inc. (Applicant) v. Teamsters Local Union 230 affiliated with the International Brotherhood of Teamsters (Respondent) (*Withdrawn*)
- **0870-95-U:** Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 (Applicant) v. Tilbury Concrete Transport Inc. (Respondent) (*Endorsed Settlement*)
- 1111-95-U: Ontario Public Service Employees Union (Applicant) v. Cerminara Boys' Residence Incorporated (Respondent) (*Withdrawn*)
- 1122-95-U: C.U.P.E. Local 3009 (Applicant) v. Christian and Missionary Alliance Eastern and Central District Operating as Camawoodlands (Respondent) (Withdrawn)
- **1199-95-U:** Roy Johnson (Applicant) v. International Association of Machinists and Aerospace Workers Local Lodge 2243 (Respondent) v. R-Theta Inc. (Intervener) (*Withdrawn*)
- **1206-95-U; 1215-95-U:** Hamilton Civics Hospital (Social Workers Henderson Division) (Applicant) v. Canadian Union of Public Employees Local 794 (Respondent); Hamilton Civic Hospitals (Social Workers Hamilton General Division) (Applicant) v. C.U.P.E. Local #794 (Respondent) (*Withdrawn*)
- 1246-95-U: Service Employees International Union, Local 204 (Applicant) v. Digs for Kids (Respondent) (Withdrawn)
- 1250-95-U: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., a division of Royplast Limited, Royal Plastics Group Limited, Joseph Liberman, Stephen Cork, Vittorio De Zen (Respondent) (Withdrawn)
- **1287-95-U:** William J. Groulx (Applicant) v. Milk and Bread Driver, Dairy Employees Caterers and Allied Employees Local Union No. 647, Becker Milk Co., Becker Milk Company (Respondents) (*Withdrawn*)
- **1295-95-U:** William Joseph Palmer (Applicant) v. Standard Products (Canada Limited) (Respondent) (Withdrawn)
- **1304-95-U:** Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Decor Drywall (Respondent) (Endorsed Settlement)
- 1359-95-U: John M.G.M. Francisco, Tony Ferreira, Dale Dawe, Kim Dawe (Applicant) v. Amalgamated Transit Union, Local 1573, The Corporation of the City of Brampton (Brampton Transit) (Respondents) (Dismissed)
- 1427-95-U: Dennis Patterson (Applicant) v. International Union United Automobile, Aerospace and Agricul-

tural Implement Workers of America, UAW Local 251 (Respondent) v. Solus Manufacturing - a Division of H.E. Vannatter (Intervener) (*Terminated*)

1440-95-U: Scott Carlson (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Terminated*)

1478-95-U: Len Morgan (Applicant) v. C.A.W. Local 397 (Respondent) (Terminated)

1487-95-U: The Canadian Union of Public Employees, and its Local 1196 (Applicant) v. The York Region Board of Education and Mr. Garth Bell (Respondent) (Withdrawn)

1508-95-U; 1603-95-U: IWA - Canada, Local 2693 (Applicant) v. Hill's Greenhouse Ltd. (Respondent) (Withdrawn)

1531-95-U: Interior Systems Contractors Association of Ontario ("ISCA") (Applicant) v. Drywall Acoustic Lathing and Insulation, Local 675 ("Local 675") (Respondent) v. Doug Bickle, Henry Bickle, Roy Williamson, Victor DaSilva, Ivo Bodlovic and workers listed in appendix A and other relevant workers (Intervener) (Dismissed)

1568-95-U: Canadian Union of Public Employees (Applicant) v. 1024436 Ontario Limited c.o.b. as Charms of Pakenham (Respondent) (Withdrawn)

1578-95-U: International Union United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 251 (Applicant) v. Waltec Components Division of Emco Limited (Respondent) (Withdrawn)

1596-95-U: Dario Moreira, Jose Moreira, Justino Moreira (Applicants) v. Marel Contractors (Respondent) (Withdrawn)

1602-95-U: Doug Bickle, Henry Bickle, Roy Williamson, Victor DaSilva, Ivo Bodlovic and workers listed in appendix A and other relevant workers ("objecting employees") (Applicants) v. Drywall Acoustic Lathing and Insulation, Local 675 ("Local 675"), The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America ("OPC"), United Brotherhood of Carpenters and Joiners of America (the "International"), Helmut Redermeier and Collin Weller and Jim Smith (Respondents) (*Granted*)

1608-95-U: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Imperial Parking Limited (Respondent) (Withdrawn)

1631-95-U: Canadian Union of Public Employees (Applicant) v. Nelson House of Ottawa-Carleton (Respondent) (Withdrawn)

1644-95-U: Bakery, Confectionery & Tobacco Workers International Union, Local 264 (Applicant) v. Restauronics Services Ltd. (Respondent) (Withdrawn)

1682-95-U: Union of Needletrades, Industrial & Textile Employees (formerly Amalgamated Clothing and Textile Workers Union) (Applicant) v. National Carpet Mills Inc. and/or National Fibertech Inc. (Respondent) (Withdrawn)

1696-95-U: United Steelworkers of America (Applicant) v. J.M.P. Maintenance Ltd. (Respondent) (Withdrawn)

1702-95-U: Kevin Fox (Applicant) v. Labourer's International Union Local 493 (Respondent) (Withdrawn)

1725-95-U: Teamsters Local Union 938 (Applicant) v. Skanna Systems Investigations (Respondent) (Withdrawn)

1757-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Auto-Pak Ltd. (Respondent) (Withdrawn)

1775-95-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Fibre Resource Recovery Corp. (Respondent) (*Terminated*)

1787-95-U: Allison Lambert (Applicant) v. Service Employees International Union, Local 204 (Respondent) (Withdrawn)

1829-95-U: Northdale Contractors Inc. (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) (*Withdrawn*)

1863-95-U: Rejeanne McCarthy (Applicant) v. Service Employees Union Local 478 (Respondent) (Withdrawn)

1869-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Graham's I.G.A. (Respondent) (*Withdrawn*)

1889-95-U: Greg Reesor and a group of employees (Applicant) v. Teamsters Local 230 (Respondent) (Withdrawn)

1909-95-U: Susan Barrette (Applicant) v. Humber Sheet Metal Ltd. (Respondent) (Dismissed)

1948-95-U: Pollution Control Division and Electrical Division Corporation of the City of Orillia (Applicant) v. I.B.E.W. Local 636 (Respondent) (*Dismissed*)

2005-95-U: Anantram Ragobeer (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local Union 1027 (Respondent) (*Dismissed*)

2049-95-U: Ashoka Boodhoo (Applicant) v. Riverdale Hospital and CUPE Local 79 (Respondents) (Dismissed)

2051-95-U: David A. Carlisle (Applicant) v. Toronto Transit Commission, Amalgamated Transit Union, Local 113 (Respondents) (*Dismissed*)

2082-95-U: Arthur Brazeau (Applicant) v. Labourers' International Union of North America, Local 491 (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

1697-95-M: United Steelworkers of America (Applicant) v. J.M.P. Maintenance Ltd. (Respondent) (Withdrawn)

1776-95-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Fibre Resource Recovery Corp. (Respondent) (*Terminated*)

1785-95-M: Canadian Union of Operating Engineers and General Workers (Applicant) v. Burlington Golf and Country Club Limited (Respondent) (*Withdrawn*)

1868-95-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Graham's I.G.A. (Respondent) (*Withdrawn*)

1933-95-M: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Embassy Suites (Respondent) (Terminated)

2012-95-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Petro Canada

Lubricants Centre and Trafalgar Distribution Services (a division of 820990 Ontario Inc.) (Respondents) (Dismissed)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1408-95-M: Gibson Cleaners (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

1638-95-M: Alpine Graphic Productions Ltd. (Employer)) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Trade Union) (Granted)

1832-95-M: Textron Automotive Interiors (Employer) v. Steelworkers (Trade Union) (Granted)

1833-95-M: Iona Appliances Co. (Employer) v. Steelworkers of America, Local 6444 (Trade Union) (Granted)

FINANCIAL STATEMENT

0970-95-M: Donald Geisel (Applicant) v. U.F.C.W. United Food & Commercial Workers Local 173W (Respondent) (Withdrawn)

1168-95-M: Albert Antoine Plennevaux (Applicant) v. Labourers' International Union of North America, Local 1036 (Respondent) (Withdrawn)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3859-94-OH: Carl Hendershot (Applicant) v. Ford Motor Company of Canada Ltd. (Respondent) v. Pat Ford and Robert Bryce, Canadian Auto Workers Union Local 707 (Interveners) (Withdrawn)

0848-95-OH: Sheryl Danene Stephens (Applicant) v. Daniel Ogburn Maple Manor Nursing Home (Respondent) (Withdrawn)

0857-95-OH: James Baker (Applicant) v. M & J Meat Distributor's Inc. (Respondent) (Granted)

0987-95-OH: Mona Robbins (Applicant) v. Dan Ogburn Administrator of Maplewood Nursing Home (Respondent) (Withdrawn)

1103-95-OH: Carl Patterson (Applicant) v. Jaythan Inc. aka Tim Horton's Donuts (Respondent) (Withdrawn)

1473-95-OH: Don Wagar (Applicant) v. Imperial Pipe Corporation (Respondent) v. Bronislaw Musial (Intervener) (Withdrawn)

1489-95-OH: Henry March (Applicant) v. Raymond Gemma (Respondent) (Withdrawn)

1506-95-OH: Angraf Athwal (Applicant) v. John Ewing & Co. Inc. (Respondent) (Withdrawn)

1692-95-OH: Charles Clements (Applicant) v. K.R.S. Crane Rentals and or Watling Crane Rental (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0535-94-G: Ontario Allied Construction Trades Council on behalf of United Brotherhood of Carpenters and Joiners of America and its Local 27 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Dismissed*)

- 0783-94-G; 0784-94-G: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Masonry Contracting Ltd., Odex Masonry Ltd. and Falcon Masonry (Respondents); Labourers' International Union of North America, Local 1059 (Applicant) v. Classic Masonry Contracting Ltd., Odex Masonry Ltd. and Falcon Masonry (Respondents) (Dismissed)
- **1280-94-G:** Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Artcon Masonry Inc. (Respondent) (*Endorsed Settlement*)
- **1594-94-G:** Labourers' International Union of North America, Local 183 (Applicant) v. GTG Masonry Ltd. (Respondent) (*Withdrawn*)
- **3650-94-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Eastern Concrete Drilling & Saw Cutting Ltd. (Respondent) (*Endorsed Settlement*)
- **3967-94-G:** Labourers' International Union of North America, Local 247 (Applicant) v. Robert Laframboise Mechanical Ltd. (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener) (*Dismissed*)
- **4329-94-G:** The International Brotherhood of Painters and Allied Trades Local 1590 (Applicant) v. AFG Industries Limited (Respondent) (*Withdrawn*)
- **4608-94-G**; **4609-94-G**; International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Eastern Construction Company Limited (Respondent); International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Lisgar Construction Company (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener); International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. PCL Constructors Eastern Inc. (Respondent) (*Withdrawn*)
- **0049-95-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Pall Plumbing and Heating Limited (Respondent) (Withdrawn)
- **0470-95-G:** The International Union of Elevator Constructors, Local 90 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)
- **0521-95-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. J-Aar Excavating Limited (Respondent) (*Withdrawn*)
- **0751-95-G:** United Brotherhood of Carpenters and Joiners of America Local 2041 (Applicant) v. Construction Farbec Inc. (Respondent) (*Endorsed Settlement*)
- **0771-95-G:** International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Megatech Electrical Ltd. (Respondent) (*Endorsed Settlement*)
- **0785-95-G:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Sutherland-Schultz Inc. (Respondent) (*Endorsed Settlement*)
- **0843-95-G:** Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Kennedy Masonry Company and Don Valley Masonry Ltd. (Respondents) (*Endorsed Settlement*)
- **0949-95-G:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Broneff Contractors (Respondent) (*Endorsed Settlement*)
- **0988-95-G:** Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Belmont Drywall & Acoustics Ltd. (Respondent) (*Endorsed Settlement*)
- **1256-95-G:** International Union of Elevator Constructors, Local 96 (Applicant) v. Schindler Corporation (Respondent) (*Withdrawn*)

1305-95-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Decor Drywall (Respondent) (Endorsed Settlement)

1454-95-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Amcan Custom Interiors Inc. (Respondent) (Endorsed Settlement)

1468-95-G: International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. The Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Withdrawn*)

1482-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. Rec Industries Inc. (Respondent) (Withdrawn)

1501-95-G: The Carpenters Employer Bargaining Agency ("EBA") (Applicant) v. The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America ("OPC") and Drywall Acoustic Lathing and Insulation, Local 675 ("Local 675") (Respondents) v. Doug Bickle, Henry Bickle, Roy Williamson, Victor Dasilva, Ivo Bodlovic and workers listed in appendix A and other relevant workers (Intervener) (Dismissed)

1539-95-G; 1609-95-G: International Union of Elevator Constructors, Local 50 (Applicant) v. CEE Elevator Service Ltd. (Respondent) (Withdrawn)

1592-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Aspen Concrete & Drain Inc. (Respondent) (*Endorsed Settlement*)

1594-95-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Fraser-Vien Ltd. (Respondent) (*Endorsed Settlement*)

1601-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Dor-Co Sales & Service Ltd. (Respondent) (*Endorsed Settlement*)

1611-95-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Northdale Contractors Inc. (Respondent) (*Withdrawn*)

1623-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. S. & D. Equipment Rental Ltd. (Respondent) (*Endorsed Settlement*)

1635-95-G: International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1494 (Formerly Local 1684) (Applicant) v. Windsor Glass Company Ltd. (Respondent) (Withdrawn)

1637-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Formcrete Ltd. (Respondent) (*Endorsed Settlement*)

1645-95-G: Labourers' International Union of North America, Local 527 (Applicant) v. Orion Forming Ltd. (Respondent) (*Withdrawn*)

1653-95-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. C.G.S. Contracting Ltd. (Respondent) (*Withdrawn*)

1654-95-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Corman Masonry Ltd. (Respondent) (*Withdrawn*)

1680-95-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Q-Tech Limited 663925 Ontario Inc. (Respondent) (*Endorsed Settlement*)

- **1691-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Gazzola Paving Ltd. (Respondent) (*Withdrawn*)
- **1703-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Global Store Fixtures Inc. (Respondent) (*Granted*)
- **1704-95-G:** United Brotherhood of Carpenters and Joiners of America Local 2041 (Applicant) v. J.R. Noel Plastering Ltd. (Respondent) (*Endorsed Settlement*)
- **1705-95-G:** United Brotherhood of Carpenters and Joiners of America Local 2041 (Applicant) v. Thomas Fuller Construction Co. (1958) Limited (Respondent) (*Withdrawn*)
- **1706-95-G:** United Brotherhood of Carpenters and Joiners of America Local 2041 (Applicant) v. Nation Drywall Ltd. (Respondent) (*Endorsed Settlement*)
- **1707-95-G:** United Brotherhood of Carpenters and Joiners of America Local 2041 (Applicant) v. Pino Drywall Ltd. (Respondent) (*Endorsed Settlement*)
- 1726-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Stefmarc Plumbing & Mechanical Inc. and Stephmark Mechanical Ltd. (Respondents) (Endorsed Settlement)
- 1729-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. Cover-All Mechanical Ltd. (Respondent) (Endorsed Settlement)
- 1763-95-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Everest Air Systems Div. of 1082427 Ontario Limited (Respondent) (*Endorsed Settlement*)
- 1765-95-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Applewood Air Conditioning Ltd. (Respondent) (Withdrawn)
- **1813-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Rose Interiors (Respondent) (*Withdrawn*)
- **1837-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Bondfield Construction Ltd. (Respondent) (*Endorsed Settlement*)
- **1845-95-G:** International Brotherhood Of Electrical Workers, Local Union 353 (Applicant) v. An-Dell Electric Limited (Respondent) (*Withdrawn*)
- **1847-95-G:** International Brotherhood Of Electrical Workers, Local Union 353 (Applicant) v. C.S.E. Corporation c.o.b. Concept Systems Electric (Respondent) (*Withdrawn*)
- **1849-95-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Independent High Voltage Limited (Respondent) (*Withdrawn*)
- **1851-95-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Power Plus Electrical Services Inc. (Respondent) (*Withdrawn*)
- **1854-95-G:** International Brotherhood Of Electrical Workers, Local Union 353 (Applicant) v. Unitech Electrical Inc. (Respondent) (*Withdrawn*)
- **1888-95-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Blue-Con Inc. (Respondent) (*Withdrawn*)

- 1893-95-G: Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. REP Ventilation Ltd. (Respondent) (Endorsed Settlement)
- 1905-95-G: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Bernardo Marble & Tile Ltd. (Respondent) (Endorsed Settlement)
- 1906-95-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Ebbinghaus Electric Limited, Robby Electric Ltd., Robby/Ebbinghaus Ltd. (Respondents) (*Endorsed Settlement*)
- 1908-95-G: Operative Plasterers and Cement Masons International Union, Local 124 (Applicant) v. Nabrok Interiors, a division of Nabrok Homes Ltd. Respondent) (Endorsed Settlement)
- 1911-95-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. The McBride Group Inc. (Respondent) (Endorsed Settlement)
- 1915-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Comstock Canada (Respondent) (Withdrawn)
- 1928-95-G: International Brotherhood of Painters and Allied Trades, and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Glaziers Local 1819 (Applicant) v. Castle Craft Corporation (Respondent) (Endorsed Settlement)
- 1943-95-G: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Wentworth Tile & Terrazzo Ltd. (Respondent) (Endorsed Settlement)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

- 1566-94-U: Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Brick Warehouse Corporation (Respondent) (*Denied*)
- 2469-94-R: Hospitality Employees, Service Employees Union of Canada (Applicant) v. Sip & Chat Restaurant (Respondent) (*Denied*)
- **3349-94-JD:** Labourers International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 785 and Structform International Limited (Respondents) (*Dismissed*)
- 3529-94-U: Irene E. O'Brien, Marie Pemberton, Joy B. Bailey, Jack R. Bailey, Lorne H. Switzer and Joan Shelley (Applicants) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario, represented by the Management Board of Cabinet (Intervener) (Denied)
- 3719-94-R; 3847-94-R; 3916-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent) (Denied)
- 3757-94-U: Ralph Marion and Rolly Vautour (Applicant) v. International Brotherhood of Electrical Workers Local 1687 (Respondent) (*Dismissed*)
- 4378-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Eagle Bricklayers' Construction Ltd. (Respondent) (Withdrawn)
- **4427-94-G:** The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambareri Construction Inc. (Respondent) (*Dismissed*)
- 1072-95-U: Edward Kennedy, William MacDonald (Applicants) v. Local 249 Carpenters' Union (Respondent) (Denied)

APPLICATIONS FOR ACCREDITATION

1335-95-R: Residential Framing Contractors Association of Metropolitan Toronto and Vicinity Inc. (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Metropolitan Toronto Apartment Builders Association, Toronto Housing Labour Bureau (Interveners) (Withdrawn)





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